Supreme Court, U.S.
FILED
07-625 NOV 5 - 2007
OFFICE OF THE CLERK

No. 1

In The
Supreme Court of the United States

CITY OF HEALDSBURG,
Petitioner,

v.

NORTHERN CALIFORNIA RIVER WATCH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit stretch federal Clean Water Act jurisdiction beyond permissible limits, invading state authority and exceeding Congressional intent, when it held that discharges into a groundwater aquifer is regulable under the Clean Water Act because a subterranean aquifer is a jurisdictional "wetland," in conflict with other circuits that have held Clean Water Act jurisdiction does not extend to discharges into groundwater?

2. Did the Ninth Circuit fail its obligation to defer to agency expertise and establish an impermissible rule of law when it ignored both the national policy of the Corps of Engineers regarding Clean Water Act jurisdiction over gravel mining pits being reclaimed and the Corps' disclaimer of jurisdiction in this case, and instead invented a diametrically opposite rule of law?

3. Did the Ninth Circuit, in disregard of agency expertise, err by ignoring the special status of "adjacent wetlands" and extending Clean Water Act jurisdiction to equate a man-made waterbody with an "adjacent wetland."

4. Did the Ninth Circuit establish an impossible rule when it held that a "waste treatment system" may not percolate to groundwater and must be recognized in a federal permit in order to be exempt from obtaining that same federal permit, effectively nullifying the applicable regulations?

5. Did the Ninth Circuit err in holding that the concurring opinion in *Rapanos v. United States,* 126 S.Ct. 2208 (2006), which endorsed a rule with which eight justices expressly disagreed, nonetheless established "substantial nexus" as the law of the land regarding federal jurisdiction over adjacent wetlands?

6. Even if the *Rapanos* concurrence's "substantial nexus" test is applicable, did the Ninth Circuit misapply it because it ignored Justice Kennedy's admonition that, to be jurisdictional, wetlands must "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters and that jurisdiction fails when "wetlands' effects on water quality are speculative or insubstantial?"

LIST OF ALL PARTIES

Petitioner: City of Healdsburg, a municipality

Respondent: Northern California River Watch, a California corporation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner City of Healdsburg hereby states that it is a municipality and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner City of Healdsburg ("Healdsburg") respectfully petitions this Court for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The challenged opinion and order of the Court of Appeals for the Ninth Circuit is reported as *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), and is attached as Appendix A. This opinion follows a previous opinion issued on August 10, 2006, reported at 457 F.3d 1023, that was withdrawn. The District Court opinion, dated January 23, 2004, was unpublished, and is attached as Appendix B. The judgment of the District Court is attached as Appendix C. The jurisdictional determination of the U.S. Army Corps of Engineers is attached as Appendix D.

JURISDICTION

The opinion and order of the Court of Appeals for the Ninth Circuit was entered on August 6, 2007. That court's denial of the Petition for Panel Rehearing And Rehearing *En Banc* was entered on the same date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1342 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1342(a)(1) (CWA § 402(a)(1)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
>
> . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (a) The term "waters of the United States" means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa

lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the

> final authority regarding Clean Water Act jurisdiction remains with EPA.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
>
> (b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
>
> (c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R § 328.3(a)-(c) (2005); 40 C.F.R. § 122.2.

Federal regulations define "complete waste treatment system" as:

> A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involving:

> (i) the transport of wastewater from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished;
>
> (ii) the treatment of the wastewater to remove pollutants; and
>
> (iii) the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process.

40 C.F.R. § 35.2005(12).

U.S. Army Corps of Engineers materials on the "excavation operation exception" placed in the Federal Register include:

> "[W]e generally do not consider the following waters to be 'Waters of the United States." . . . [¶]: (e) . . . pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned." 51 Fed. Reg. 41206, 41217 (1986).
>
> "In most cases, a mining site where no construction, mining, excavation, processing, and/or reclamation activities have occurred during the last 10 years would be considered abandoned, at the district engineer's discretion." 65 Fed. Reg. 12860 (March 9, 2000) (Final Notice of Nationwide Permits).
>
> "[The excavation operation exception] clearly requires that the mining activity must have

stopped, and the reclamation completed, before the area can be considered a water of the United States" 64 Fed. Reg. 39252, 39335 (July 21, 1999) (Notice of Proposed Nationwide Permits).

INTRODUCTION

This case concerns the scope of federal jurisdiction under the Clean Water Act (CWA) over underground aquifers and man-made, water-filled pits. In the decision below, the Ninth Circuit expanded CWA jurisdiction far beyond that recognized by any Circuit Court previously, holding that CWA jurisdiction extends so far as to cover a man-made gravel mining pit doubling as a municipal wastewater treatment pond and the underground aquifer into which the water in the pit percolates. The Ninth Circuit concluded the underground aquifer is a "wetland," excising from the regulatory definition the requirement that a wetland support vegetation. In reaching this result, the Ninth Circuit failed to acknowledge clear Congressional intent to exclude state-regulated groundwater from the scope of the Clean Water Act, creating a direct conflict with the Fifth and Seventh Circuits, which have held there is no CWA jurisdiction over discharges to groundwater.

In addition, the Ninth Circuit failed to show deference to, and simply ignored, the stated national policy and site-specific jurisdictional determination of the expert agency, the U. S. Army Corps of Engineers (Corps). Not only does the Corps have a national policy of excluding from CWA jurisdiction gravel mining pits undergoing reclamation, the Corps applied that policy in a written jurisdictional determination,

declining to assert jurisdiction over the very same gravel pit at issue in this case. (Appendix D) The Ninth Circuit's decision never even discussed either the Corp's policy or its site-specific jurisdictional determination.

Simultaneously, the Ninth Circuit blurred the distinction between "adjacent wetlands," which are afforded special regulatory status, and "waterbodies," for which Clean Water Act regulations grant no special status based on proximity to navigable waters. In doing so, the Ninth Circuit again failed to defer to agency expertise.

Both the Corps and its sister agency, the United States Environmental Protection Agency (EPA), by adopted regulation, also exclude from CWA jurisdiction waters that are part of a "waste treatment system," a term which includes disposal/percolation ponds. Again failing to show deference to the expert agencies, the Ninth Circuit created out of whole cloth a circular rule that (a) prohibits a percolation pond from percolating, or (b) requires a federal permit to avoid the requirement of obtaining a federal permit for waters in waste treatment systems. This strange rule effectively nullifies the regulatory "waste treatment system exception" and expands federal jurisdiction to include thousands or possibly tens of thousands of state-regulated percolation ponds and recycling and land application systems.

The Ninth Circuit also misapplied Supreme Court authority on "fragmented" opinions by this Court, holding that the solo concurring opinion in this Court's recent "adjacent wetlands" decision, *Rapanos v. United*

States, 126 S.Ct. 2208 (2006), a concurrence the other eight Justices chose not to join, nonetheless is "controlling" and establishes the law of the land regarding federal jurisdiction over "adjacent wetlands," again in conflict with other Circuits. Compounding its error, the Ninth Circuit then misapplied Justice Kennedy's "substantial nexus" test, ignoring its requirement of a "significant affect on the chemical, physical and biological integrity" of a navigable waterway, while purporting to apply pre-*Rapanos* findings without remanding to the District Court for application of its new jurisdictional test.

The Ninth Circuit's opinion introduces conflicts and errors of nationwide implication into the regulatory scheme of Clean Water Act permitting. Review by this Court is necessary to restore clarity and certainty for states regulating their own groundwater, municipalities and local agencies relying on man-made percolation ponds and land application for wastewater treatment and disposal, the gravel mining industry trying to reclaim their left-over gravel pits, landowners seeking to understand the regulatory effect of overlying an "adjacent wetland" aquifer, and for federal regulatory agencies trying to implement the important goals of the federal Clean Water Act.

STATEMENT OF THE CASE

In 1971, the City of Healdsburg, California, a small rural community located just over an hour north of San Francisco, built a new wastewater treatment plant. One of the principal purposes of this new facility was to stop discharging the city's treated wastewater directly to the Russian River, a navigable

waterway used for recreation and water supply. The solution? Use a polishing and percolation pond to hold, treat, and dispose of treated wastewater. By designing a plant to use percolation ponds as the final stage of the treatment process, the engineers were able to take advantage of natural biological treatment and filtration to produce treated wastewater that, to this day, meets virtually every federal and state drinking water standard as it percolates out of the pond and into the surrounding aquifer.

As it turned out, the engineers designing the new plant were faced with a fortuitous circumstance. Healdsburg's vineyards and agricultural land sit on top of a vast alluvial gravel bed, deposited over millennia by the Russian River. Digging down through dry land and deep into these gravel deposits, gravel mining companies were excavating pits, extracting gravel and allowing the pits to fill with groundwater. When finished, the gravel companies would "reclaim" the pits, either by filling them with overburden and gravel-wash fines from the next pit or by constructing natural-looking wetlands around their borders.

Needing a percolation pond to complete its new wastewater treatment plant, Healdsburg could have spent millions of dollars condemning valuable agricultural land and excavating a new percolation pond. Alternatively, it could get exactly the same treatment by using one of the existing gravel mining pits at a fraction of the cost. Since Healdsburg was a small community with limited resources, Healdsburg's engineers selected the latter option, specifically designing the new wastewater treatment plant to use

the available, as-yet un-reclaimed gravel pits as percolation ponds.

This design has worked for over 30 years, during which period Healdsburg continued to use one gravel pit – the 58-acre "Basalt Pond" – as the final stage of its wastewater treatment process. Even after removal of gravel from that particular gravel pit was complete and reclamation started, the "pond" continued to function as the final treatment and percolation pond for Healdsburg's wastewater treatment system. Healdsburg's use of the gravel pit was strictly regulated by permits issued under the State of California's Porter-Cologne Water Quality Control Act, widely recognized as the model for the Federal Clean Water Act.

The Basalt Pond was generally 50 to several hundred feet from the Russian River, depending on the river stage. Over 30 years, the river has flooded into the pond only two or three times. For the rest of the time, the Russian River and the Basalt Pond have remained separate. Even as reclamation activities in the Basalt Pond began to construct wetlands around the perimeter of the gravel pit, those wetlands remained separated by "uplands" from the natural wetlands along the Russian River.

Except on the rare occasion when the Russian River floods, no surface water flows from the Basalt Pond or its wetlands to the Russian River and its wetlands, or *vice versa*. Water in the Basalt Pond percolates – after a year of "polishing" in the pond – in all directions into the surrounding aquifer. Eventually, some of the percolating groundwater that had originated in the

Basalt Pond reaches the Russian River, but never in discernable amounts or with any discernable impact on the water quality of the Russian River. While computer models would later suggest that some "chloride," or salt, from Healdsburg's wastewater would reach the Russian River, the amount was so small as to disappear in the background levels of salt naturally present in the River.

Nonetheless, Plaintiff Northern California River Watch ("River Watch"), filed this action to establish federal CWA jurisdiction over Healdsburg's waste treatment pond. River Watch contended that the pond was itself a "water of the United States" due to its proximity to the Russian River and the underflow of water from the pit, through the surrounding aquifer, some of which reaches the river.

While the action was pending, River Watch requested a formal jurisdictional determination from the Corps. The move appeared to backfire, however, when the Corps concluded the Basalt Pond was *not* a jurisdictional water body. (Appendix D) Consistent with its national policy of declining to assert jurisdiction over gravel pits being reclaimed, the Corps concluded that the Basalt Pond was not yet subject to the Corps' CWA jurisdiction. (Appendix D)

Although the Corps' jurisdictional determination was adverse to River Watch, it was never directly challenged by River Watch. Instead, River Watch returned to its pending litigation and, after a four-day bench trial in December 2003, the District Court issued an opinion finding that the gravel pit is a "water of the United States" and subject to the CWA's

permitting requirements. The District Court held that "Basalt Pond and its wetlands are 'adjacent' to the Russian River within the meaning of the [adjacent wetland] regulation." (Appendix B, p. 42a) The District Court also held that the vast aquifer underlying the entire alluvial valley is "a slow moving tributary of the river." (Appendix B, p. 26a) According to the District Court, the Basalt Pond gravel pit is simply "an open way station of the underground tributary." (Appendix B, p. 26a)

On appeal, the Court of Appeals for the Ninth Circuit first issued an opinion on August 10, 2006. Healdsburg petitioned for rehearing by the panel and *en banc*. River Watch, and late-entrant United States, filed motions for reconsideration and clarification. Without hearing, the Ninth Circuit panel issued a superseding opinion on August 6, 2007.

First, the Ninth Circuit determined that the waste treatment pond and its surrounding underground aquifer "qualify as wetlands under the regulatory definition," a decision that was based on a misreading of the pertinent regulation. (Appendix A, p. 8a) The Ninth Circuit selectively relied on just part of the Corps' definition of "wetlands" – "those areas that are inundated or saturated by surface or groundwater" – and disregarded the remainder of the regulation that defines wetlands as having "a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). By this bowdlerization of the regulation, the Ninth Circuit equated aquifers and wetlands: "The record here reflects that the Russian River and surrounding area, including the Pond itself, rest on top of a vast gravel bed extending as much as

sixty feet into the earth. The gravel bed is a porous medium, saturated with water. Through it flows an equally vast underground aquifer. . . . The Basalt Pond and its surrounding area are therefore regulable under the Clean Water Act, because they qualify as wetlands under the regulatory definition." (Appendix A, p. 8a) The Ninth Circuit concluded that the waste treatment pond and its surrounding area are "regulable under the Clean Water Act" simply because they rest on a saturated aquifer. (Appendix A, p. 8a)

Nowhere in the opinion does the Ninth Circuit even acknowledge that an aquifer is not a "swamp, marsh or bog" and does not have "a prevalence of vegetation typically adapted for life in saturated soil conditions." Although extensively briefed, the Ninth Circuit did not even discuss the legislative history of the CWA that makes it clear that Congress did not intend CWA jurisdiction to extend to discharges into groundwater.

Second, the Ninth Circuit adopted as the "controlling" rule of law Justice Kennedy's concurrence in *Rapanos v. United States,* 126 S.Ct. 2208 (2006), even though no other Justice joined that concurrence. The Ninth Circuit wrote that in "a 4-4-1 decision, the controlling opinion is that of Justice Kennedy who said that to qualify as a regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable." (Appendix A, p. 3a) The Ninth Circuit concluded that Justice Kennedy's "concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases," even though he concurred only in the judgment and not in the

plurality's rationale, or even in an included subset of that rationale. (Appendix A, p. 12a) The Ninth Circuit does not explain how it derives a rule of law from speculating what the Justices of this Court would do "in *almost* all cases" and "if forced to choose." (Appendix A, p. 12a)

Third, unlike other circuits that have remanded cases in light of *Rapanos*, the Ninth Circuit purported to apply Justice Kennedy's "significant nexus" test by reinterpreting findings made by the District Court without the benefit of this Court's *Rapanos* opinion. The Ninth Circuit determined that the treatment pond falls within the EPA's and Corps' definition of "adjacent wetland" because it is part of a "larger" wetland: "The Pond is part of a larger wetland that is 'adjacent' to the River within the meaning of *Riverside Bayview Homes*. There is also a 'substantial nexus' present under the analysis of Justice Kennedy in *Rapanos*." (Appendix A, p. 14a) This "larger wetland" theory of jurisdiction over an "adjacent" *waterbody* has no basis in the regulations adopted by the Corps and the EPA and, in fact, disregards the Corps' expertise and scientific approach to wetlands delineation.

Fourth, the Ninth Circuit found that the pond "may be part of a waste treatment system" but refused to apply the "waste treatment system" exception set forth in the regulations on the basis of a rationale that does not appear in the regulation: "Basalt Pond may be part of a waste treatment system, but it does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." (Appendix A,

p. 18a) Neither the "self-contained" nor the NPDES permit requirements appear in the regulation.

Last, in direct contradiction of the Corps' policy, the Ninth Circuit refused to apply the Corps' "excavation operation" exception on the rationale that it applies only to extraction, not reclamation: "The excavation operation exemption applies only to ponds undergoing actual extraction." (Appendix A, p. 19a) The Ninth Circuit failed to even mention, much less defer to, Corps' policy stating that CWA jurisdiction does *not* extend to areas being reclaimed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER THE CLEAN WATER ACT APPLIES TO DISCHARGES INTO GROUNDWATER

The Ninth Circuit is in clear conflict with other circuits on the issue of whether CWA jurisdiction extends to discharges to groundwater. Contrary to other circuits, the Ninth Circuit has extended CWA jurisdiction to discharges into groundwater, invading state authority in this area and ignoring well-established Congressional intent.

The Ninth Circuit determined that the waste treatment pond and its surrounding area "qualify as wetlands under the regulatory definition" because they rest on a "saturated" aquifer and so are "regulable under the Clean Water Act." (Appendix A, pp. 7a-9a)

The Ninth Circuit thus equated adjacent wetlands (which fall within the CWA under EPA and Corps' regulations and this Court's precedent) and groundwater aquifers (which are outside the CWA under the legislative history, the regulations, and long-standing precedent). In effect, the Ninth Circuit invented a new definition of "waters of the United States" and added a new twist on the definition of "adjacent wetlands." According to the Ninth Circuit, ponds – even man-made ponds – that seep into groundwater aquifers are "waters of the United States" because aquifers, being saturated soil, are subterranean "adjacent wetlands" and thus "waters of the United States."

One significant flaw in the Ninth Circuit's rule is that Congress did not intend the CWA to extend to discharges into groundwater. Neither the EPA nor the Corps have adopted regulations extending jurisdiction to groundwater. Other circuits have recognized this limitation on CWA jurisdiction, and the Ninth Circuit's rule is now in conflict with those other circuits.

Until now, the two Circuits that had considered the issue agreed that Congress did not intend the CWA to regulate discharges into groundwater. A third Circuit has deferred to the Corps' expertise to reach the same result.

In *Exxon Corporation v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977), the Fifth Circuit concluded "the legislative history demonstrates conclusively that Congress believed it was not granting the Administrator [of the EPA] *any* power to control disposal into groundwater." *Id.* at 1329 (emphasis in

original). Rather, Congressional intent was to leave control of discharges to groundwater to the states:

> [W]e have examined the structure of the Act and its legislative history in an attempt to discern the congressional intent with regard to the question here. What we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters. Instead, the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because "it is contrary to congressional intentions."

Id. at 1322 (quoting *EPA v. State Water Resources Control Board*, 426 U.S. 200, 227 (1976)). Referring to the Senate committee considering the draft Clean Water Act, the Fifth Circuit found that "as we read the Senate report, the committee did not intend to interfere with or displace the 'complex and varied' state jurisdictions over groundwaters. Rather, it meant only to help provide the states with the information needed to operate their own groundwater pollution control programs, the establishment of which § 402(b)(1)(D) was designed to encourage." *Id.* at 1326.

The Fifth Circuit has also considered whether an impact on *surface* waters via a groundwater "conduit"

is sufficient to establish federal CWA jurisdiction, again holding it is not. In *Rice v. Harken Exploration* Co., 250 F.3d 264, 269 (5th Cir. 2001), the Plaintiff claimed that "Harken's discharges [of hydrocarbons and brine] have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water." *Id.* at 270. Despite this alleged adverse impact on surface waters, the *Rice* court held:

> "Navigable waters" do not include groundwater. It would be an unwarranted expansion . . . to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a "discharge" "into or upon the navigable waters." . . . In light of Congress's decision not to regulate ground waters under the CWA/OPA, we are reluctant to construe the OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of "navigable waters."

Id. at 271-72.

Similarly, the Seventh Circuit, in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), *cert. denied*, 513 U.S. 930 (1994), rejected the notion that a man-made pond was subject to the Clean Water Act solely because water in it percolated into the groundwater which ultimately traveled to local lakes and streams:

> What of the possibility that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the "waters of the United States"? . . . Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.
>
> The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own.

Id. at 965.

Reaching the same conclusion by a slightly different route, the First Circuit has also concluded that groundwater is not a "water of the United States":

> Although this definition does not indicate whether groundwater constitutes "waters of the United States," the Corps has interpreted this definition to refer only to surface waters. This interpretation has been upheld by some courts. *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977); *Kelley v. United States*, 618 F.Supp. 1103, 1105 (W.D. Mich. 1985); *United States v. GAF Corp.*, 389 F.Supp. 1379, 1383 (S.D. Tex. 1975). Although other courts have questioned whether the term "waters of the United States" should include groundwaters connected to surface waters -- *Inland Steel Co. v. E.P.A.*, 901

> F.2d 1419, 1422 (7th Cir. 1990); *McClellan Ecological Seepage v. Weinberger*, 707 F.Supp. 1182, 1193-94 (E.D. Cal. 1988) -- we agree with the Corps that since such a determination ultimately involves an ecological judgment about the relationship between surface waters and groundwaters, it should be left in the first instance to the discretion of the EPA and the Corps. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134, 106 S.Ct. 455, 463, 88 L.Ed.2d 419 (1985) (deference should be given to "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands").

Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1450-51 (1st Cir. 1992).

The Ninth Circuit sidestepped the well-reasoned authority of these three different Circuits, disregarded Congressional intent and administrative expertise, and adopted the conflicting view that a groundwater aquifer is regulable as an adjacent wetland and is therefore, a "water of the United States." This conflict must be resolved.

II.

THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* TO REVIEW THE NINTH CIRCUIT'S FAILURE TO EVEN ACKNOWLEDGE, LET ALONE GIVE DEFERENCE TO, THE EXPERT AGENCY'S DETERMINATION THAT BASALT POND IS COVERED BY THE EXCAVATION OPERATION EXCEPTION

Under the Corps of Engineer's policy, water-filled pits resulting from gravel excavations are not deemed "waters of the United States" until the "excavation operation is abandoned." 51 Fed Reg. 41206, 41217 (1986).

Even as it acknowledged this rule, the Ninth Circuit ignored the Corps' interpretation of its own rule, holding that "excavation" of these pits is inconsistent with "reclamation" of them, so that federal CWA jurisdiction over water-filled gravel pits inures the moment gravel extraction ceases and reclamation of the pit begins. In establishing this new rule of law, the Ninth Circuit ignored the Corps' national policy formulated under the environmentally-sensitive Clinton/Gore administration that, to encourage pit reclamation, these pits do not fall under CWA jurisdiction until reclamation is *complete*. By refusing to give deference to, or even mention, the Corps of Engineers' interpretation of the "excavation operation exception," the Ninth Circuit violated established principles of judicial review of agency action long recognized by this Court.

As interpreted by the Corps in the preamble to its regulation defining the term "waters of the United States," that term does not include "pits excavated in

dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned." 51 Fed. Reg. 41206, 41217 (1986). The Corps in a series of Federal Register notices has consistently taken the position that the excavation operation exemption includes *processing* and *reclamation*. *See* 65 Fed. Reg. 12860 (March 9, 2000) (final notice of nationwide permits, stating that "[i]n most cases, a mining site where *no* construction, mining, excavation, *processing, and/or reclamation activities* have occurred during the last 10 years would be considered abandoned, at the district engineer's discretion.") (emphasis added); 64 Fed. Reg. 39252, 39335 (July 21, 1999) (notice of proposed nationwide permits, noting that the excavation operation exception "clearly requires that the mining activity must have stopped, *and the reclamation completed*, before the area can be considered a water of the United States"; emphasis added).

It is undisputed that the "Basalt Pond" gravel mining pit is undergoing reclamation, and so it is not abandoned under the Corps' interpretation of its own regulations. Therefore, under the interpretation of the agency with primary jurisdiction, the gravel pit being used as a waste treatment pond is not a "water of the United States." Indeed, the Corps issued a formal letter disclaiming CWA jurisdiction over the Pond on the grounds that the Pond has been in continuous commercial use and was undergoing reclamation as part of the ongoing gravel mining operation. (Appendix D.) This disclaimer was never directly challenged by River Watch.

Nonetheless, and in direct contradiction of the Corps' own interpretation, the Ninth Circuit erroneously read the term "excavation operation" to apply only to "extraction" and not to "reclamation." It therefore found that the Basalt Pond had been "abandoned" and so is a "water of the United States." Indeed, the Ninth Circuit did not even acknowledge either the Corps' interpretation of its own policy or its application of that policy to this specific gravel pit.

This Court has long held that deference is due to the Corps' interpretation of the Clean Water Act as long as it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985); *see also Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844-45 (1984). Where, as here, "the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The Ninth Circuit's failure to give deference here is even more surprising since in the past that court has recognized that "[t]he agency's interpretation of its own regulation is entitled to even greater deference, amounting to a plain error standard." *Leslie Salt v. United States*, 896 F.2d 354, 357 (9th Cir. 1990) (granting deference to the same preamble language at issue here), *cert. denied*, 408 U.S. 1126 (1991).

Indeed, a majority of this Court reaffirmed in *Rapanos* that the Corps is entitled to considerable deference in interpreting the requirements of the CWA that it administers. Justice Kennedy reaffirmed the statement of deference to the Corps' construction of the CWA as stated in *Riverside Bayview*. *Rapanos* v.

United States, 126 S.Ct. 2208, 2240 (2006) (Kennedy, J., concurring) (citing *Riverside Bayview*, 474 U.S. at 131). Justice Stevens, writing for the four dissenters in *Rapanos,* states that "the Corps' approach should command our deference." *Id.* at 2262 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting). Likewise, Justice Breyer in his separate dissent states that "[i]f one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review)." *Id.* at 2266 (Breyer, J., dissenting).

In the present matter, the Corps has made the "complex technical judgments" that gravel mining pits being reclaimed are not generally subject to federal CWA jurisdiction and, specifically, that CWA jurisdiction does not extend to the particular gravel mining pit at issue in this case. The Ninth Circuit's failure to give this determination deferential judicial review undermines established principles of review of agency action and therefore merits this Court's review.

III.
THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* TO REVIEW THE NINTH CIRCUIT'S DECISION THAT IMPROPERLY EXTENDS CWA JURISDICTION BY LABELING ADJACENT WATERBODIES AS ADJACENT WETLANDS

The Ninth Circuit decision throws into chaos the critical legal distinction between wetlands adjacent to waters subject to CWA jurisdiction, and other bodies of water, such as ponds, that are in some proximity to jurisdictional waters. Adjacent *wetlands* are subject to

CWA jurisdiction if they meet the criteria of the applicable federal regulations. By contrast, there is no such rule for adjacent *waterbodies*. This is no regulatory quirk; this Court has deferred to the Corps' special treatment of adjacent wetlands based upon the important environmental functions they serve. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). More recently, this Court affirmed its rationale for finding that the adjacent wetlands in *Riverside Bayview* came under CWA jurisdiction: "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate *wetlands* 'inseparably bound up with the "waters" of the United States.'" *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 167 (2001) (emphasis added). The Ninth Circuit's decision ignores the special status of adjacent wetlands long recognized by this Court.

The Ninth Circuit decision selectively ignores key regulatory definitions in order to treat Basalt Pond, an open waterbody fringed with wetlands, as one big "adjacent wetland" subject to CWA regulation. By failing once again to give deference to the expert administrative agencies, the Ninth Circuit has issued a precedent wildly at variance with an established rule for determining CWA jurisdiction approved by this Court in *Riverside* and *SWANCC*. Furthermore, the extension of CWA regulation to the entire pond rests on the notion that the wetlands around the pond are themselves "adjacent wetlands" subject to CWA jurisdiction, a premise that is itself incorrect.

The Ninth Circuit decision states that because the Pond "contains and is surrounded by wetlands," it is regulable under the CWA. (Appendix A, p. 9a) The decision does not explain why wetlands surrounding or intruding into an open body of water render the entire waterbody an "adjacent wetland." By contrast, an earlier Ninth Circuit decision emphatically applied the distinction between jurisdictional adjacent wetlands and a non-jurisdictional adjacent pond. *See San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704, 702 (9th Cir. 2007) (stating that that "the district court improperly expanded the regulatory definition of 'waters of the United States' when it held that bodies of water that are adjacent to navigable waters are subject to the CWA by reason of that adjacency []" and that "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland [].'") The instant Ninth Circuit decision attempts to distinguish *Cargill* on the basis that the pond in *Cargill* did not contain and was not surrounded by wetlands. (Appendix A, p. 9a) However, this distinction is of no importance, since it does not explain how the presence of wetlands can transform the rest of an open waterbody into a water of the United States based on the regulatory definition of "adjacent wetlands." The Ninth Circuit decision in this case represents a drastic change in approach from *Cargill*, and extends regulation to waterbodies that would not be regulated under *Cargill*, without any legal basis whatsoever.

The Ninth Circuit decision does not even discuss, let alone defer to, the expert agencies' carefully drawn distinction between waterbodies and wetlands. The governing regulations specifically address only

adjacent wetlands, not adjacent waterbodies. *See* 33 C.F.R. § 328.3(a)(7) (Corps regulations); 40 C.F.R. § 122.2 (EPA regulations) (defining "waters of the United States" to include "Wetlands adjacent to waters (other than waters that are themselves wetlands)."). Further, the regulations define wetlands in a manner that, of necessity, excludes large open waterbodies: "'Wetlands' are defined to mean areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, *and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions*. Wetlands generally include swamps, marshes, bogs, and similar areas." *Id.* (emphasis added). Indeed, there is an established science to delineating wetlands, as distinguished from uplands and open waters, that evaluates depth of water, hydric vegetation and other characteristics. *See* U.S. Army Corps of Engineers Wetlands Delineation Manual, Part II (wetlands are "inundated either permanently or periodically at mean water depths <6.6 ft"), *reproduced at* www.wetlands.com/regs/tlpge02e.htm (visited on October 29, 2007).

The regulatory distinction between waterbodies and wetlands is applied on a routine basis by the agencies themselves as well as by the regulated community. Property owners whose land contains both wetlands and bodies of open water should be able to rely on the long-established regulatory distinction described above in making decisions about commitment of resources and the use of their land. The Ninth Circuit decision throws this certainty into disarray, with potential deleterious effects of national scope.

IV.
THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* TO RESOLVE WHETHER THE NINTH CIRCUIT ADOPTED AN UNWORKABLE INTERPRETATION OF THE WASTE TREATMENT SYSTEM EXCEPTION

The Ninth Circuit adopted an interpretation of the "waste treatment system" exemption that establishes an unworkable rule of law and that conflicts with other circuits. The exemption provides that "[w]aste treatment systems . . . are not waters of the United States." 33 C.F.R. § 328.3(a)(8). EPA has defined "waste treatment systems" broadly, to encompass both treatment an disposal facilities:

> A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involving: (i) The transport of wastewater from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished; (ii) the treatment of the wastewater to remove pollutants; and (iii) the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process.

40 C.F.R. § 35.2005(12).

The Ninth Circuit did not dispute that Healdsburg's gravel mining pit/percolation pond was, in fact, part of Healdsburg's waste treatment system. Instead, imposing entirely new conditions found nowhere in the regulations, the Ninth Circuit ruled

that the pond "may be part of a waste treatment system" but concluded that the pond "does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." (Appendix A, p. 18a)

The first part of the Ninth Circuit's test is in conflict with the First, Fifth and Seventh Circuits' interpretation of the CWA. As discussed above, Congress did not intend the CWA to apply to discharges to groundwater. Yet, here, the Ninth Circuit's interpretation of the "waste treatment exception" is predicated on the notion that jurisdiction is present because the waste treatment pond is not a "self-contained" system (i.e., not a lined *evaporation* pond) but, rather, as a *percolation* pond, it seeps into the surrounding groundwater. The first part of the Ninth Circuit's new rule is unsupported by either agency regulation or Congressional intent.

The second part of the Ninth Circuit's rationale, which requires that a treatment pond be "incorporated into [a federal] permit" is just plain unworkable. In effect, the Ninth Circuit says that it takes a federal permit to avoid the necessity of having that same federal permit. Healdsburg's situation is the perfect example. For thirty years, Healdsburg operated its waste treatment system under a state-issued permit which acknowledged Healdsburg's use of the gravel pit as a polishing and percolation pond. Yet, because the system did not discharge directly to a navigable waterway and so did not need a "federal" permit until the Ninth Circuit changed the rules, this thirty-year old percolation pond is suddenly no longer part of

Healdsburg's "waste treatment system." This rationale is circular and unworkable and leaves the regulated community without clear standards. Ultimately, it renders the waste treatment system exception largely a nullity.

V.

THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* TO DETERMINE THE CONTROLLING RULE OF LAW FOR ADJACENT WETLANDS AND TO RESOLVE A SPLIT IN THE CIRCUITS ON THIS ISSUE

The Ninth Circuit adopted as the controlling rule of law of *Rapanos* the "significant nexus" test of Justice Kennedy's concurrence, even though no other Justice joined that opinion. The Ninth Circuit wrote that in the "4-4-1 decision, the controlling opinion is that of Justice Kennedy" because his "concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." (Appendix A, pp. 3a & 12a) Not only is it an error of law for the Ninth Circuit to conclude that Justice Kennedy's concurrence is "controlling," the Circuits are split on how to apply the fragmented *Rapanos* opinion.

The procedure for determining the effect of a fragmented Supreme Court opinion is to determine the narrowest ground of agreement among a majority of the Justices concurring in the judgment: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977). The

narrowest ground of agreement is not necessarily reflected in the concurring opinion. For example, in the decision followed by *Marks*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the plurality represented the narrowest ground of agreement. *Marks*, 430 U.S. at 193-94. Accordingly, the "view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards." *Id.*

Applying the *Marks* rule, it cannot be said that the *Rapanos* plurality and Justice Kennedy agreed on anything except that the judgment had to be vacated and the matter remanded for further fact-finding. There was no agreement on the rationale, and neither the plurality's "continuous surface connection" nor the concurrence's "significant nexus" tests can be said to be a narrower subset of the other. The plurality and the concurrence merely took different roads to the same destination. Thus no agreed road map or rule of law can be extracted from Justice Kennedy's concurrence under a *Marks* analysis.[1]

The difficulty in applying the *Rapanos* decision has already caused a split in the circuits. The Seventh, Ninth and Eleventh Circuits have adopted Justice Kennedy's test as controlling. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir.

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[1] Notably, contrary to the Ninth Circuit's reformulation of the *Marks* rule there is no "if forced to choose" analysis in *Marks*, nor does the *Marks* rule allow for an "in *almost* all cases" qualifier. These convenient modifiers to the *Marks* rule have no support in this Court's precedents.

2006) ("Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires factfinding not yet undertaken by the district court. We therefore remand the case to that court for such further proceedings as may be necessary to apply the standard."), *cert. denied*, 552 U.S. --- (Oct. 1, 2007); *Northern California River Watch v. Healdsburg*, (Appendix A, p. 3a) ("controlling opinion is that of Justice Kennedy"); *United States v. Robison*, Case No. 05-17019, 2007 WL 3087419, at *11 (11th Cir. Oct. 24, 2007) ("we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*," rejecting the First Circuit's "either/or" test from *Johnson*, *infra*). In contrast, the First Circuit has adopted Justice Stevens' suggestion that either the plurality's test *or* Justice Kennedy's test may be applied. *See Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting) ("on remand each of the judgments should be reinstated if *either* of those tests is met"). In *United States v. Johnson*, the First Circuit wrote that on remand, the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. --- (Oct. 9, 2007).[2]

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[2] It is significant that in each of the prior cases raising this issue to the Court, *Gerke* and *Johnson*, the Circuit Court had remanded the matter for further fact-finding. No such remand has occurred in this case, so this issue here is final and ripe for review.

This conflict between the Circuits has been expressly recognized by the Eleventh Circuit. *See United States v. Robison*, Case No. 05-17019, 2007 WL 3087419, at *9 (11th Cir. Oct. 24, 2007) ("The circuits likewise are split on the question of which *Rapanos* opinion provides the holding."). *Certiorari* should be granted to resolve this conflict between the Circuits and give clarity to this important issue.

VI.

ASSUMING THAT THE "SIGNIFICANT NEXUS" TEST APPLIES, THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE ISSUE OF WHETHER THERE CAN BE A SIGNIFICANT NEXUS EVEN THOUGH THE WETLANDS' EFFECT ON NAVIGABLE WATERS IS INSUBSTANTIAL

The Ninth Circuit misapplied Justice Kennedy's "substantial nexus" test from *Rapanos* without even remanding for further fact-finding. If applied properly, on remand, it is likely that no jurisdiction over the treatment pond would be found under the substantial nexus test or, indeed, under *any* of the rationales expressed in the various *Rapanos* opinions.

For example, under the *Rapanos* plurality's analysis, which the Ninth Circuit ignores, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 126 S.Ct. at 2226 (Scalia, J., joined by Roberts, C.J., Thomas, Alito, J.J.) (emphasis in original). CWA jurisdiction would not reach the gravel pit/treatment pond under this rule

because there is no "continuous surface connection" between the gravel pit and the Russian River, and the gravel pit and the Russian River are clearly demarcated by natural uplands.

Under four Justices' dissenting view, which the Ninth Circuit also ignores, "the Corps' approach should command our deference." *Id.* at 2262 (Stevens, J., joined by Souter, Ginsburg & Breyer, J.J., dissenting). Under this rationale, there would be no CWA jurisdiction here because, consistent with its published policy, the Corps disclaimed jurisdiction over the gravel pit/treatment pond, a decision entitled to deference.

Even under Justice Kennedy's analysis, if applied correctly, the treatment pond would not be an "adjacent" wetland because there was no evidence that its wetlands, or even the gravel pit/treatment pond itself, has more than a speculative or insubstantial effect on water quality in the Russian River.

To reach its conclusion, the Ninth Circuit ignored Justice Kennedy's critical admonition that to be jurisdictional the *wetlands* must "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters and that jurisdiction fails when "wetlands' effects on water quality are speculative or insubstantial":

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect

> the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Rapanos, 126 S.Ct. at 2248 (Kennedy, J., concurring in the judgment of remand).[3]

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[3] The Ninth Circuit also implied that under Justice Kennedy's concurrence in *Rapanos*, *any* wetlands in proximity to a traditionally navigable water – such as those ringing Basalt Pond – are "adjacent wetlands" subject to CWA jurisdiction "by showing adjacency alone." (Appendix A, p. 14a (quoting *Rapanos*, 126 S.Ct. at 2248, Kennedy, J., concurring)). This, again, is a misreading of Justice Kennedy's concurrence. Justice Kennedy's statement quoted by the Ninth Circuit referred to wetlands like those in *Riverside Bayview Homes* that *directly abut* traditionally navigable waters. *See* 126 S.Ct. at 2248 (characterizing the "adjacency alone" formulation as the holding in *Riverside Bayview*). In *Riverside Bayview Homes*, "the lands at issue formed part of a wetland that directly abutted a navigable-in-fact creek[]." *Rapanos*, 126 S.Ct. at 2240 (Kennedy, J., concurring) citing *Riverside Bayview Homes*, 474 U.S. at 131. By contrast, the gravel pit and its reclamation wetlands are separated from the Russian River by natural uplands. Neither the Kennedy concurrence in *Rapanos* nor *Riverside Bayview Homes* holds that a wetland that does not abut a navigable water, but instead is separated from the navigable waterway by natural uplands, is subject to CWA jurisdiction by virtue of mere proximity alone.

The Ninth Circuit made at least two critical mistakes in applying the significant nexus test. First, as explained in parts I and III above, the Ninth Circuit conjured up a "larger wetland" made up of the wetlands that fringe the pond, the pond itself, and the underground aquifer that underlies the pond. (Appendix A, pp. 7a-9a, 14a) The next step in the Ninth Circuit's analysis was to conclude that this "larger wetland" is "adjacent to" the Russian River, and has a significant nexus to the River, thereby rendering the pond regulable under the CWA. (Appendix A, p. 14a) However, the only wetlands involved in this case are those that border the gravel pit, and there is no evidence that *those wetlands*, as distinct from the gravel pit's filtering silt lining, "significantly affect" the water quality of the Russian River. Under Justice Kennedy's analysis, the wetlands that now ring the gravel pit would not be "adjacent" wetlands because they have no more than a speculative or insubstantial effect on water quality in the Russian River. This first mistake alone is reason to grant *certiorari*.

Second, the Ninth Circuit even misapplied the substantial nexus test to the "larger wetlands" by deciding that the pit, its wetlands, and the underground aquifer, taken as a whole, had an effect on the river that rises to the level of significant nexus. (Appendix A, pp. 14a-16a) In other words, even assuming *arguendo* that the "larger wetland" exists, the Ninth Circuit misapplied Justice Kennedy's test. This is not just a question of disputing the Court of Appeals' view of the evidence; the Ninth Circuit decision squarely raises the all-important *legal* issue of what degree of impact on navigable waters is needed

in order to meet the significant nexus test. In effect, the Ninth Circuit found that *any* effect qualifies, even if only theoretical and indiscernible. This is a radical interpretation that reads the term "significant" right out of the test, and has potentially enormous implications nationwide.

Rather than remanding the matter, the Ninth Circuit revamped the District Court's findings to apply the new "substantial nexus" test in the first instance on appeal. First, the Court held that the gravel pit was a part of a "large wetland" (i.e., the underground aquifer) which was itself "adjacent" to the Russian River. (Appendix A, pp. 14a & 20a) Second, the Court concluded that the water in the gravel pit had "connection" to the Russian River both as a result of occasional flooding of the pit by the river and due to underflow through the aquifer from the pit to the river. (Appendix A, p. 15a) Third, the Court noted that birds and animals may travel from the pit to the river and back, and that fish found in the river also live in the 68-acre gravel pit. (Appendix A, p. 15a) Finally, the Court reinterpreted the District Court's finding that "excessive *amounts* of chloride" (emphasis added) reach the river from the pit (Appendix B, p. 48a) to conclude there was a significant *effect* on the water in the river. (Appendix A, pp. 15a & 16a) Nowhere in the District Court's opinion did the District Court find that any of these factors had *a significant effect on the water in the river*, the *sine qua non* of the "substantial nexus" test. On the contrary, as the District Court noted, as soon as any salt reaches the river, it is then "greatly diluted by the river." (Appendix B, p. 48a.) The District Court does *not* make the finding attributed to it by the Ninth Circuit that the underflow

from the gravel pit in fact significantly affects the water in the river.

As Justice Kennedy stated, "When . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters"" *Rapanos*, 126 S.Ct. at 2248 (Kennedy, J., concurring in the judgment of remand). The only evidence before the District Court regarding impact on the navigable-in-fact waterway, the Russian River, was that the amount of salt transmitted through the aquifer to the river was *indiscernible* in comparison to the naturally-occurring salt in the river. Under Justice Kennedy's analysis, any effect of the gravel pit on the water quality of the river could only be deemed "insubstantial."

The Ninth Circuit's expansive reading of the significant nexus test runs counter to Justice Kennedy's own explication of the test, and has the potential to expand tremendously the number of waters subject to regulation under the CWA. Even assuming that Justice Kennedy's test controls, this Court should grant *certiorari* to correct a serious misreading of that formulation.

CONCLUSION

The Ninth Circuit's opinion in this matter should not be allowed to stand because it vastly expands CWA jurisdiction, conflicts with Congressional intent and other circuits by imposing CWA jurisdiction to groundwater aquifers, violates regulatory intent by defining a waterbody as a wetland, fails to defer to the

established policy and specific determination of the Corps of Engineers, proposes an unworkable interpretation of the waste treatment system exception, and ignores and misapplies the *Rapanos* opinions.

Dated: November, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15442

[Filed August 6, 2007]

NORTHERN CALIFORNIA RIVER WATCH, a non-profit corporation,
Plaintiff-Appellee,

v.

CITY OF HEALDSBURG, and Does 1-10 inclusive.
Defendant-Appellant.

Before: Mary M. Schroeder, Chief Judge, Jerome Farris and Consuelo M. Callahan, Circuit Judges.

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding
D.C. No. CV-01-04686-WHA

ORDER

The opinion filed August 10, 2006, slip op. 9299, and appearing at 457 F.3d 1023 (9th Cir. 2006) is withdrawn, and a new opinion will be filed in its stead.

The Petitions for Rehearing and Rehearing En Banc are otherwise DENIED, no further petitions for rehearing will be accepted.

OPINION

SCHROEDER, Chief Judge:

Defendant/Appellant City of Healdsburg ("Healdsburg") appeals the district court's judgment in favor of Plaintiff/Appellee Northern California River Watch ("River Watch"), an environmental group, in this litigation under the Clean Water Act ("CWA"). Plaintiff alleges that Healdsburg, without first obtaining a National Pollutant Discharge Elimination System ("NPDES") permit, violated the CWA by discharging sewage from its waste treatment plant into waters covered by the Act. Healdsburg discharged the sewage into a body of water known as "Basalt Pond," a rock quarry pit that had filled with water from the surrounding aquifer, located next to the Russian River.

The issue is whether Basalt Pond is subject to the CWA because the Pond, containing wetlands, borders additional wetlands that are adjacent to a navigable river of the United States. The district court held that discharges into the Pond are discharges into the Russian River, a navigable water of the United States

protected by the CWA. The court followed the United States Supreme Court decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Supreme Court, however, has now narrowed the scope of that decision. *See Rapanos v. United States*, 126 S.Ct. 2208 (2006). In a 4-4-1 decision, the controlling opinion is that of Justice Kennedy who said that to qualify as a regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a "significant nexus" to a waterway that is in fact navigable.

In light of *Rapanos*, we conclude that Basalt Pond possesses such a "significant nexus" to waters that are navigable in fact, not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the River. We affirm the district court's holding that Basalt Pond is subject to the CWA. We also affirm the district court's ruling that neither the waste treatment system nor the excavation operation exceptions in the Act apply to Healdsburg's discharges.

BACKGROUND

The Clean Water Act of 1972 provides the foundation for this case. *See* 33 U.S.C. § 1251. The primary objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To effectuate this objective, one of the CWA's principal sections strictly prohibits discharges of pollutants into the "navigable waters of the United States" without an

NPDES permit from the Environmental Protection Agency ("EPA"). 33 U.S.C. § 1311(a). The CWA defines the term "navigable waters" to mean "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Basalt Pond was created in approximately 1967 when the Basalt Rock Company began excavating gravel and sand from land near the Russian River. After the top soil was ripped away, large machines tore out rock and sand. The result was a pit. The pit filled with water up to the line of the water table of the surrounding aquifer. Today, Basalt Pond, measuring one half mile in length and a quarter mile in breadth, contains 58 acres of surface water. The Pond lies along the west side of the Russian River, separated from the River by wetlands and a levee.

It is undisputed that the Russian River is a navigable water of the United States. Its headwaters originate in Mendocino County, California. Its main course runs about 110 miles, flowing into the Pacific Ocean west of Santa Rosa.

The horizontal distance between the edge of the River and the edge of the Pond varies between 50 and several hundred feet, depending on the exact location and the height of the river water. Usually, there is no surface connection, because the levee blocks it and prevents the Pond from being inundated by high river waters in the rainy season.

In 1971, Healdsburg built a secondary waste-treatment plant on a 35-acre site located on the north side of Basalt Pond about 800 feet from and west

of the Russian River. Prior to 1978, Healdsburg discharged the plant's wastewater into another water-filled pit located to the north. In 1978, Healdsburg began discharging into Basalt Pond. Although Healdsburg did not obtain an NPDES permit, it received a state water emission permit as well as permission from Syar Industries, Inc., the current owner and manager of land and operations at Basalt Pond.

The wastewater was discharged into Basalt Pond from the plant at about 420 to 455 million gallons per year between 1998 and 2000. The volume of the Pond itself is somewhat larger — 450 to 740 million gallons. The annual outflow from the sewage plant, therefore, is sufficient to fill the entire Pond every one to two years. Basalt Pond would, of course, soon overflow in these circumstances were it not for the fact that the Pond drains into the surrounding aquifer.

Pond water in the aquifer finds its way to the River over a period of a few months and seeps into the River along as much as 2200 feet of its banks. The district court made specific findings as to the impact of the wastewater ultimately draining into the Russian River. First, the district court noted that not all the sewage in the wastewater reached the River. The wastewater is partially cleansed as it passes through the bottom and sides of the Basalt Pond. Healdsburg refers to this process as "polishing" or "percolation." The wetlands around Basalt Pond also help cleanse the outflow by passing the effluent through the wetlands sediment. The filtration is effective in reducing biochemical oxygen demand and removing some pollutants, but the filtration is not perfect.

The district court found that the concentrations of chloride in the groundwater between the Pond and the Russian River are substantially higher than in the surrounding area. Chloride, which already exists in the Pond due to naturally occurring salts, reaches the River in higher concentrations as a direct result of Healdsburg's discharge of sewage into the Pond. Mr. John Lambie, a water expert for Healdsburg, testified at trial that the average concentration of chloride appearing upstream in the River is only 5.9 parts per million. In contrast, the average concentration of chloride seeping from Basalt Pond into the River is 36 parts per million. At a monitoring well between the Pond and the River, the underground concentration is diluted to some 30 parts per million. Ultimately, a chloride concentration of 18 parts per million appears on the west side of the River. The district court thus found that chloride from the Pond over time makes its way to the River in higher concentrations than naturally occurring in the River. This finding was further supported by Dr. Larry Russell, one of River Watch's trial experts.

Plaintiffs filed this suit on December 4, 2001, alleging that Healdsburg is violating the CWA by discharging wastewater into Basalt Pond. After a four day trial, the district court made findings of fact to support its holding that Healdsburg discharged sewage into a protected water of the United States in violation of the CWA. The court's holding was premised on the legal conclusion that Basalt Pond is a "water of the United States" within the meaning of the CWA. *See* 2004 WL 201502 (N.D. Cal.). This appeal followed.

DISCUSSION

A. Wetlands Constituting Waters of the United States

[1] Congress passed the Clean Water Act in 1972. The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 33 U.S.C. § 1251(a). To that end, the statute, among other things, prohibits "the discharge of any pollutant by any person" except as provided in the Act. § 1311(a).

[2] After the CWA was passed, an issue arose concerning the extent to which wetlands adjacent to navigable waters constitute "waters of the United States." In 1978, the Army Corps of Engineers ("ACOE") issued regulations defining "waters of the United States" to include "adjacent wetlands." 33 C.F.R. § 328.3(a)(7). The regulations specifically provide that "[t]he term 'waters of the United States' means," among other things, "[w]etlands adjacent to waters." *Id.* The regulations further specify that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' " 33 C.F.R. § 328.3(c).

The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. *Riverside Bayview Homes*, 474 U.S. 121; 33 C.F.R. 328.3(a)(1),(4),(7). The only question reserved in *Riverside Bayview Homes* was the issue of CWA

jurisdiction over truly isolated waters. *See Rapanos*, 126 S.Ct. at 2255 n.3.

Thus, the first issue before us is whether Basalt Pond and the wetlands in it are isolated waters, or whether they constitute covered wetlands within the meaning of the regulations and within the scope of *Riverside Bayview Homes* and *Rapanos*.

[3] The applicable regulations define wetlands as "those areas that are inundated or saturated by surface or groundwater." *See* 33 C.F.R. § 328.3(b). The record here reflects that the Russian River and surrounding area, including the Pond itself, rest on top of a vast gravel bed extending as much as sixty feet into the earth. The gravel bed is a porous medium, saturated with water. Through it flows an equally vast underground aquifer. This aquifer supplies the principal pathway for a continuous passage of water between Basalt Pond and the Russian River. Beneath the surface, water soaks in and out of the Pond via the underground aquifer. This action is continuous, 24 hours a day, seven days a week, 365 days a year. Indeed, the parties have stipulated that the Pond and the River overlie the same unconfined aquifer and that the land separating the two is saturated below the water table.

[4] The Basalt Pond and its surrounding area are therefore regulable under the Clean Water Act, because they qualify as wetlands under the regulatory definition. The district court explicitly found that the Pond is not only surrounded by extensive wetlands, which connect to the Russian River, but also that the Pond's shoreline has receded so substantially that

much of the area that was originally Basalt Pond has turned into wetland. This case is thus different than our recent decision in *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007), because here, the Pond is not isolated; it contains and is surrounded by wetlands, rendering it regulable under the CWA.

The remaining question is whether, under *Rapanos* and its antecedents, Basalt Pond is a "water of the United States" because it is sufficiently adjacent to the navigable Russian River to confer jurisdiction or alternatively because it has a substantial nexus to the River.

The Supreme Court has not yet agreed upon a satisfactory explanation of when wetlands are sufficiently adjacent to navigable waters to confer CWA jurisdiction. The leading case addressing the issue is *Riverside Bayview Homes*, 474 U.S. 121, which was decided in 1985. The Supreme Court there upheld CWA jurisdiction over wetlands that directly abutted a navigable creek. The Court held that "the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134.

[5] In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court again interpreted the CWA term "navigable waters" and held that isolated ponds and mudflats, unconnected to other waters covered by the Act, were not "waters of the United States, because they were either not

sufficiently adjacent to navigable waterways or did not have a substantial nexus to such waters." The case involved ponds that had been formed as a result of an abandoned sand and gravel pit mining operation, but were not "adjacent wetlands." The ACOE regulations defined the ponds nevertheless to be "waters of the United States," because they were "used as habitat by other migratory birds which cross state lines." 40 C.F.R. § 328.3(a)(3)(b). Under this "Migratory Bird Rule," ponds that are isolated from navigable waters may constitute "waters of the United States" if they are used as habitat by migratory birds. The Supreme Court rejected that theory and held that the CWA does not protect isolated ponds without a significant nexus to navigable water. The Court explained that, "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*." *Id.* at 167.

The Supreme Court in *SWANCC*, therefore, invalidated the Migratory Bird Rule but did not purport to reconsider its prior holding regarding adjacent wetlands in *Riverside Bayview Homes*. In *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, 425 F.3d 1150 (9th Cir. 2005), we expressly recognized that *SWANCC* invalidated the ACOE's Migratory Bird Rule, but did not overrule *Riverside Bayview Homes*. Our conclusion in *Baccarat* is consistent with other circuits that have also held that *SWANCC* did not overrule *Riverside Bayview Homes*. *See United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006); *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006).

In the last term the Supreme Court also discussed the intersection between *Riverside Bayview Homes* and *SWANCC*. *Rapanos*, 126 S.Ct. 2208. The *Rapanos* decision involved two consolidated cases, *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) (*Rapanos I*), and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

The first consolidated case, *Rapanos I*, involved three land parcels near Midland, Michigan. The first parcel, known as the Salzburg site, consisted of roughly 230 acres. The Salzburg site included 28 acres of wetlands. The district court found, on the basis of expert testimony, that water from the site spilled into the Hoppler Drain, which carried water into the Hoppler Creek and ultimately into the Kawkawlin River, which is navigable. The second parcel, known as the Hines Road site, consisted of 275 acres, which included 64 acres of wetlands. These wetlands had a surface-water connection to the Rose Drain, which carried water into the Tittabawassee River, a navigable waterway. The final parcel, called the Pine River site, consisted of some 200 acres. This site included 49 acres of wetlands, and a surface water connection linked the wetlands to the nearby Pine River, which flowed into Lake Huron. The wetlands at issue in all three parcels were neither directly adjacent to nor entirely isolated from a navigable water of the United States.

The United States brought an action against the Rapanos petitioners for civil violations of the CWA. Specifically, the government claimed that petitioners discharged fill into protected wetlands, failed to respond to requests for information, and ignored

administrative compliance orders. After a 13-day bench trial, the district court made factual findings upholding the Corps' jurisdiction over wetlands on the three parcels. On the merits the court ruled in the government's favor, finding that violations occurred at all three sites. The United States Court of Appeals for the Sixth Circuit affirmed, 376 F.3d 629 (2004). The other consolidated case, *Carabell*, similarly involved discharges into wetlands that connected through a series of waterways to a navigable water of the United States, and the Sixth Circuit similarly held that the wetlands were covered by the Act. 391 F.3d 704 (6th Cir. 2004).

In *Rapanos*, a 4-4-1 plurality opinion, the Supreme Court addressed how the term "navigable waters" should be construed under the Act. The plurality, written by Justice Scalia for four Justices, would have reversed on the grounds that only those wetlands with a continuous surface connection to bodies that are "waters of the United States" are protected under the CWA. Justice Stevens, writing the dissent for four Justices, would have affirmed on the grounds that even wetlands not directly adjacent to navigable waters, but adjacent to tributaries of navigable waters, are protected under the CWA. Justice Stevens also argued that *Riverside Bayview Homes* is still the controlling precedent and does not require a "significant nexus" test.

Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment. His concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases. *See United States v. Gerke*,

464 F.3d 723, 724 (7th Cir. 2006); *see also Rapanos*, 126 S. Ct. at 2265 n.13 (J. Stevens dissenting). Thus, as the Seventh Circuit extensively explained in *Gerke*, 464 F.3d 724, Justice Kennedy's concurrence provides the controlling rule of law for our case. *See also Marks v. United States*, 430 U.S. 188, 193 (1997).

Justice Kennedy said that when wetlands are isolated, or adjacent only to a non-navigable tributary of a navigable waterway, those wetlands are regulable under the CWA only if there is a significant nexus between the wetlands at issue and the navigable waterway. *Rapanos*, 126 S. Ct. at 2248. He explained that a significant nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 126 S.Ct. at 2248. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

In addressing whether a hydrological connection satisfies the "significant nexus" test, Justice Kennedy explained that a "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251. Rather, the "required nexus must be assessed in terms of the statute's goals and purposes," which are to "restore and maintain the chemical, physical, and biological

integrity of the Nation's waters." *Id.* at 2248 (internal quotations and citations omitted).

[6] Justice Kennedy thus established a substantial nexus test for the applicability of the Act, concluding that "absent a significant nexus, jurisdiction under the Act is lacking." *Id.* at 2241. But, at the same time, Justice Kennedy also reaffirmed the holding of *Riverside Bayview Homes* that wetlands adjacent to navigable waterways are covered by the Act, saying that by virtue of the "reasonable inference of ecologic interconnnection," assertion of jurisdiction "is sustainable under the Act by showing adjacency alone." *Id.* at 2248. This indicates that a significant nexus may be inferred when wetlands are adjacent to navigable waters.

In this case, we have both. The Pond is part of a larger wetland that is "adjacent" to the River within the meaning of *Riverside Bayview Homes*. There is also a "substantial nexus" present under the analysis of Justice Kennedy in *Rapanos*.

[7] The water from the Pond seeps into the river through both the surface wetlands and the underground aquifer. The district court's findings of fact regarding this hydrological connection support the conclusion that Basalt Pond has a significant effect on "the chemical, physical, and biological integrity" of the Russian River. There is accordingly a substantial nexus between the Basalt Pond and covered waters sufficient to confer jurisdiction under the Act pursuant to Justice Kennedy's substantial nexus test. *See id.* at 2241.

With respect to the physical effect on the River, there is an actual surface connection between Basalt Pond and the Russian River when the River overflows the levee and the two bodies of water commingle. There is also an underground hydraulic connection between the two bodies, so a change in the water level in one immediately affects the water level in the other. Basalt Pond drains into the aquifer and at least 26 percent of the Pond's volume annually reaches the River itself. Thus, there are several hydrological connections between Basalt Pond's wetlands and the Russian River that affect the physical integrity of the River.

In addition to these physical connections between Basalt Pond and the Russian River, the district court found that there is also a significant ecological connection. The Pond and its wetlands support substantial bird, mammal and fish populations, all as an integral part of and indistinguishable from the rest of the Russian River ecosystem. Many of the bird populations at the Pond are familiar along the River, including cormorants, great egrets, mallards, sparrows, and fish-eaters. Fish indigenous to the River also live in the Pond due to the recurring breaches of the levee. As the district court observed, these facts make Basalt Pond indistinguishable from any of the natural wetlands alongside the Russian River that have extensive biological effects on the River itself.

The district court also found that Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels. The chloride from Basalt Pond reaches the River in higher concentrations as a direct result of Healdsburg's

discharge of sewage into the pond. Mr. John Lambie testified at trial that the average concentration of chloride appearing upstream in the river is only 5.9 parts per million. In contrast, the average concentration of chloride seeping from Basalt Pond into the River is 36 parts per million, and the chloride concentration on the west side of the River adjacent to the Pond is 18 parts per million.

[8] In sum, the district court made substantial findings of fact to support the conclusion that Basalt Pond has a significant nexus to the Russian River. The Pond's effects on the Russian River are not speculative or insubstantial. Rather, the Pond significantly affects the physical, biological and chemical integrity of the Russian River, and ultimately warrants protection as a "navigable water" under the CWA. Appellant's discharge of wastewater into Basalt Pond without a permit, therefore, violates the CWA unless it falls within one of the Act's exceptions.

B. Waste Treatment System Exception

[9] Appellant claims that even if Basalt Pond constitutes a water of the United States it is exempt from protection under the CWA's waste treatment system exception. The CWA excludes "waste treatment systems" from "waters of the United States." The CWA regulations specifically provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet

> the criteria of this definition) are not waters of the United States.

33 C.F.R. § 328.3(a)(8).

Claims of exemption, from the jurisdiction or permitting requirements, of the CWA's broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA. *See United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). Furthermore, appellant has the burden to prove that this exception applies to its discharge of wastewater into Basalt Pond. *See United States v. First City National Bank*, 386 U.S. 361, 366 (1967); *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480, 1484 (9th Cir. 1987) (vacated on other grounds by *Union Oil Co. of California v. Sierra Club*, 485 U.S. 931 (1988)).

The waste treatment system exemption was intended to exempt either water systems that do not discharge into waters of the United States or waters that are incorporated in an NPDES permit as part of a treatment system. *See* 44 Fed. Reg. 32858 (June 1, 1979); *In the Matter of: Borden, Inc. / Colonial Sugars*, 1984 1 E.A.D. 895 (E.P.A. 1984). In other words, a permit is not required to discharge pollutants into a self-contained body of water that has no connection to a water of the United States, or into a body of water that is connected to a water of the United States, but that is part of an approved treatment system. The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds. *See* 45 Fed. Reg. 48620-21 (July 21, 1980) (emphasis added). Regulations under the CWA, however, still extend to

discharges *from* treatment ponds. *Id.* (emphasis added).

[10] Basalt Pond may be part of a waste treatment system, but it does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system. For these reasons, we hold that Basalt Pond is not a waste treatment system exempt from coverage under the Act.

C. The Excavation Operation Exception

Healdsburg also argues that Basalt Pond is exempt from protection under the CWA because it is the site of an ongoing excavation operation. In its preamble to the revisions to its CWA regulation, the ACOE stated:

> For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States . . . ."
>
> * * *
>
> *(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States* (see 33 C.F.R § 328.3(a)).

51 Fed.Reg. 41206, 41217 (1986) (emphasis added). Appellant argues that Basalt Pond is used as part of

an active gravel excavation operation and is, therefore, exempt from NPDES regulation. The district court correctly found that there is no merit to this claim.

The district court found that although Syar operates reclamation activities at Basalt Pond, those activities do not constitute an ongoing excavation operation as defined by the ACOE's exemption. The Basalt Rock Company, Syar's predecessor, ceased its excavation of rock or sand from Basalt Pond in 1984. Syar, through its reclamation activities, has never extracted rock or sand from the pond. Rather, Syar has pumped a slurry of sand and sediment *into* Basalt Pond. These findings support the conclusion that all excavation operations at Basalt Pond have been abandoned.

[11] Syar does continue to use Basalt Pond as a discharge location for its surface mining operations at other locations, but this does not constitute ongoing excavation operations. The excavation operation exemption applies only to ponds undergoing actual extraction. Basalt Pond is merely tangential to Syar's excavation of other lands. Our holding in *Leslie Salt* clarifies that the ACOE extraction operations exemption does not apply to a body of water which might be part of general commercial activity. 896 F.2d at 359. Rather, the exemption applies only to bodies of water that are currently and directly under active excavation. *Id.*; *see also Golden Gate Audubon Soc., Inc. v. U. S. Army Corps of Engineers (Audubon II)*, 796 F.Supp. 1306, 1315 (N.D. Cal. 1992). The district court correctly held that the excavation operations exception does not apply in this case.

CONCLUSION

The Basalt Pond is part of a larger wetland adjacent to the Russian River. It also has a significant nexus to the Russian River, a navigable water of the United States. Healdsburg, by discharging wastewater into the Pond without an NPDES permit, therefore, violated the CWA. The decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-04686 WHA

[Filed January 23, 2004]

NORTHERN CALIFORNIA RIVER WATCH, a non-profit corporation,
Plaintiff,

v.

CITY OF HEALDSBURG,
Defendant.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REMEDIAL ORDER AFTER BENCH TRIAL

INTRODUCTION

The basic question concerns the extent to which a pond formed from an old gravel pit and adjacent wetlands, all alongside the Russian River, are within the jurisdiction of the *Clean Water Act*. The issue is of importance because defendant City of Healdsburg discharges all of its treated sewage into the pond, which then drains via an aquifer into the nearby Russian River. It does so without an NPDES permit. After a bench trial, this order now holds that an NPDES permit is needed.

PROCEDURAL HISTORY

Plaintiff Northern California River Watch filed the instant citizen suit under the Clean Water Act against defendant City of Healdsburg on December 4, 2001. The complaint was based on allegations that Healdsburg routinely makes unauthorized discharges of pollutants from its waste-treatment facility into Basalt Pond, a pond formed from an old gravel mining pit alongside the Russian River. The pond and its wetlands, River Watch claims, are part of the "navigable waters of the United States." It is stipulated (No. 28) that plaintiff has standing to assert claims with regard to the Russian River under the Act. Similar allegations formed the basis of a companion suit filed by River Watch on July 9, 2002, against Syar Industries, Inc., as to its wastewater discharges into Basalt Pond. The actions were consolidated. Syar settled. The consent decree was filed on August 5, 2003, bringing to a close the litigation as to Syar.

River Watch and Healdsburg filed cross-motions for summary judgment. The Court granted partial summary judgment in favor of River Watch, finding that Healdsburg (i) discharged (ii) treated wastewater (iii) from a pipe extending from its treatment plant into Basalt Pond (iv) without an NPDES permit. On the summary-judgment record presented, however, whether Basalt Pond was within the "navigable waters of the United States" remained an open question. A bench trial commenced December 16, 2003. After four days of evidence and argument, this order now sets forth the Court's findings of fact and conclusions of law.[1]

FINDINGS OF FACT

The Russian River, all agree, is within the navigable waters of the United States. Its headwaters originate in Mendocino County, California. Its main course runs about 110 miles, flowing into the Pacific Ocean west of Santa Rosa. Before modern times, the Russian River occasionally overflowed its banks and created natural ponds and wetlands along its banks. During high water, it forged new channels, stranding the old channels, creating oxbow lakes, and saturating and supporting adjacent wetlands. All of these ponds and wetlands, together with the river, supported plant life and fish and wildlife in an integrated ecosystem.

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[1] Except in instances where citation may be of particular use to the parties or the court of appeals, this order will *not* cite the record, finding it unnecessary and cumbersome.

With civilization, the river became more controlled. Towns grew up along and near the river. Nearby land was cleared for agriculture and ranching. To protect these developments, levees were built in some places, dams in others, and the channel was dredged for flood control. The river was not completely tamed, however. Even today, large storms overpower the flood controls on occasion. In 1995, during persistent winter rains, the levee between the river and the site here in question, the so-called Basalt Pond in Sonoma County, was breached twice and once again in 1997. In 2002, the flood level reached within a foot of the levee top, even after an extra three vertical feet had been added to the levee.

The Russian River and surrounding area rest on top of a vast gravel bed extending as much as sixty feet into the earth. The gravel bed is the result of ancient processes over geologic time whereby rock was washed downstream, the edges sanded smooth. This resulted in huge deposits of river rock, sand, and gravel. The gravel bed is a porous medium, saturated with water. Through it flows an equally vast underground aquifer. This fact poses two significant points of interest in this case. It explains why so much gravel mining has occurred along the river. It also supplies the principal pathway for a continuous passage of water between Basalt Pond and the Russian River.

Basalt Pond lies alongside and west of the river, the two separated by a levee. Whether a tarn, even a slight one, pre-existed the Basalt Pond excavation is doubtful on this record. Be that as it may, we know that in approximately 1967, the Basalt Rock Company, a division of Dillingham Construction Company, began

excavating gravel and sand from the terrace land near the river (as well as other mining locations in the surrounding area). The terrace top soil was ripped away. Large machines then tore out rock and sand. When the water table was reached, drag lines continued the excavation, dropping into the water and pulling out more rock and sand. The ore was hauled away and processed at a nearby plant. The result was a pit. It filled with water up to the line of the water table of the surrounding aquifer, *i.e.*, the pond opened the aquifer to the sky. In this manner, Basalt Pond was created. Today, the pond has 58 acres of surface water. It is a half-mile long and a quarter-mile across. A map of the river and the pond is reproduced in Figure 1.

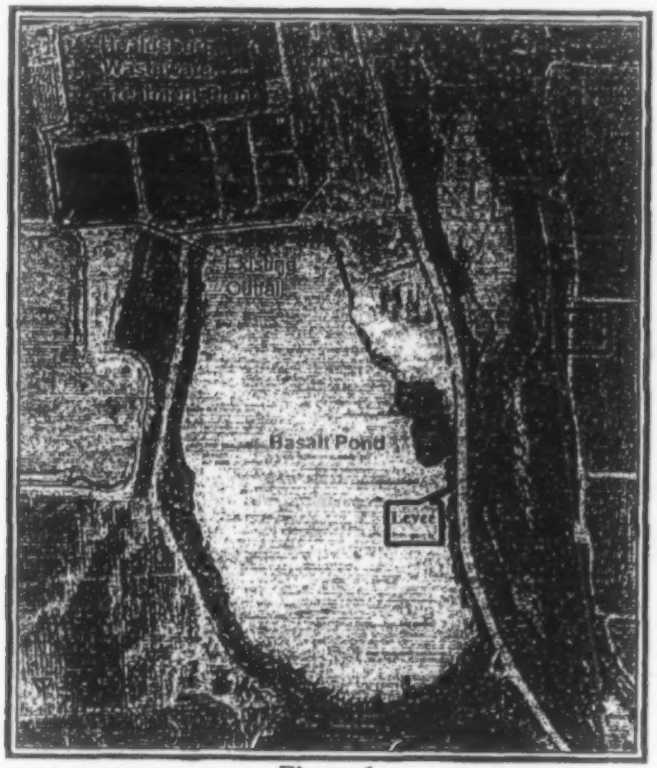

Figure 1

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The horizontal distance between the river's edge and the pond's edge varies between fifty and several hundred feet, depending on the exact location and the height of the water. For at least 750 feet along the east side of the pond, the distance is less than 100 to 200 feet at normal water stages (TX 21 at H1365). Normally, there is no surface connection, the levee blocking the way. But for the levee the pond would be inundated by high river waters in the rainy season. As stated, the levee has broken three times in the last eight years, each time the levee being repaired within a few months (Stip. No. 18). To a minor extent, a vestige of uplands remain in some places near the pond, but they are below the levee top and are likewise subject to inundation.

Beneath the surface the story is different. There, water soaks in and out of the pond via the pervasive underground aquifer. This action is continuous, 24 hours a day, seven days a week, 365 days a year. In fact, water from the aquifer flows downhill from the side of the valley, *through* the pond and *under* the levee -- all via the gravel-laden, water-saturated aquifer. The subterranean flow finally bleeds into the river itself or at least a large part of it does. It is stipulated herein that the pond and the river overlie the same unconfined aquifer and that the land separating the two is saturated below the water table. In this sense, the underground aquifer is a slow-moving, underground tributary of the river. The pond is an open way station on the underground tributary.

In an official report, Healdsburg itself has characterized the water system as follows (TX 24 at H3037):

> The groundwater basin is hydraulically connected to the Russian River. In the Russian River Valley, groundwater moves from the margins toward the Russian River during most of the year. Groundwater in the project area generally flows to the southeast with a gentle gradient. When groundwater levels are depressed, usually during the fall, flow in Russia River recharges the groundwater reservoir. River water moves into the alluvium during high river stages in the autumn and winter, and also during the summer in locations where large volumes of water are withdrawn from the river. Most recharge to the groundwater is derived from infiltration of rain that falls on the valley floor and from seepage into permeable deposits that underlie channels of the tributary streams.

Although the Basalt Rock Company began its excavation of Basalt Pond in 1967, excavation ceased in 1984. In 1986, Syar Industries, Inc., acquired all of the local land and business of the Basalt Rock Company. Syar did not resume any extraction at Basalt Pond. Syar, however, carried on and still does carry on extraction at *other* pits in the area. Since 1984, no excavation has occurred at Basalt Pond. No activity at all was underway at the pond between 1984 to 1986 (TX 7 at RW0462-63). Healdsburg itself has referred to Basalt Pond as "an abandoned quarry" (TX 24 at H3038).

Reclamation activities by Syar, however, have been underway at Basalt Pond since 1986. To this end, Syar has pumped a slurry of sand and sediment from its

main aggregate processing plant near Healdsburg via a long pipe into Basalt Pond. This slurry is a by-product of rock extracted elsewhere -- again, not from Basalt Pond. The outfall from the slurry pipe flows onto the margin of Basalt Pond, the outfall point being moved from time to time, such that the sediment and fill have slowly been filling in and reclaiming the edges of the pond as wetlands. As well, a considerable amount of sediment has drifted over the entirety of the pond and settled to the bottom, forming a layer that helps filter out pollutants as water drains into the aquifer. Since 1993, Syar has been directed by the county to direct the flow of sediment to the bank near the levee. This is meant to strengthen the levee (on the pond side). The reclamation/slurry process is expected to go on for many years.

Trees and plants have also been planted along the reclaimed margins, all for the purpose of developing man-made wetlands. Most of the plants and trees that inhabit the riparian forests along the river and pond are wind pollinated and disperse their seeds by wind. The result is that similar plants and trees appear in abundance in both locations. A few of the most common include cottonwoods, coyote brush, willows, and red willow trees. Although virtually the entire perimeter of the pond is now wetlands, the predominate wetlands are along the east and southeast margins of the pond. The perimeter is characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction.

The wetlands, in turn, now support substantial bird, animal and fish populations, all as an integral

part of and indistinguishable from the rest of the Russian River ecosystem. Many of the bird populations at the pond are familiar along the river, including cormorants, great egrets, mallards, sparrows, and fish-eaters. Fish indigenous to the river also live in the pond due to the recurring breaches of the levee. As a result, it would be hard to distinguish Basalt Pond from any of the natural wetlands and tarns that have developed alongside the Russian River over the course of time.

In 1971, defendant City of Healdsburg built a secondary waste-treatment plant on a 35-acre site located on the north side of Basalt Pond about 800 feet from and west of the river. Prior to 1978, Healdsburg discharged its wastewater into another water-filled pit located to the north. In 1978, Healdsburg began discharging into Basalt Pond. It continues to do so pursuant to permission from Syar and pursuant to a state water permit. The treated outfall, however, does not meet NPDES standards. No NPDES permit has ever been obtained.

Wastewater discharges to Basalt Pond from the plant were between 420 and 455 million gallons per year between 1998 and 2000. The volume of the pond itself is of the same order of magnitude -- 450 to 740 million gallons. The annual outflow from the sewage plant, therefore, is sufficient to fill the entire pond every one to two years. The pond would, of course, soon overflow in these circumstances were it not for the fact that the pond drains into the surrounding aquifer. Because of this drainage, the pond has reached a

steady state in which the "volume in" equals the "volume out." [2]

Much evidence was received at trial on the precise underground relationship between the pond and the river. The normal surface level of the pond is only a few feet higher than the normal level of the river. This conforms to the general terrain by which the underground aquifer, collecting water from the larger drainage of the river valley, flows downhill through the pond and then into the river or river bed. The large quantity of treated sewage has caused the level of the pond water to rise somewhat higher than the normal water table of the groundwater. As stated, the downhill flow passes through the pond, albeit slowly, and eventually moves yet farther downhill. According to Healdsburg's water expert at trial, at least one-fourth of the liquid in the pond finds its way into the river proper. Healdsburg's own environmental impact report gave a higher and more probable estimate: "It is likely that the entire volume of treated wastewater and aggregate wash water discharged to Basalt Pond (2.1 cfs) will eventually migrate to the River, either directly through the aquifer or indirectly" (TX 24 at H3186-87). Pond water will ordinarily take several months to find its way to the river and drains into the river over a stretch as long as 2200 feet. Although the discharges into the pond do not meet NPDES standards, the pollutants are diluted by the time they actually bleed into the Russian River.

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[2] The primary "volume in" comes from the plant. The primary "volume out" is drainage to the aquifer. There is also rainfall (in), aquifer leakage (in), and evaporation (out), all lesser factors.

In passing through the bottom and sides of the Basalt Pond, the effluent is partially cleansed. This cleansing and settling process is sometimes referred to as "polishing" or "percolation" by Healdsburg. Since groundwater flows through the pond, the flow is not only through the bottom, as Healdsburg contends, but also is through the sides including through the wetlands along the margin of the pond -- particularly those heavier wetlands between the pond and the levee. These wetlands also help cleanse the outflow by passing the effluent through the wetlands sediment, just as the outflow through the silt bottom likewise filters the fluid. The filtration is effective in reducing biochemical oxygen demand and removing some pollutants.

The filtration is not perfect. The concentrations of chloride in the groundwater between the pond and the river, for example, are substantially higher than in the surrounding area. Chloride, which already exists in the pond due to naturally occurring salts, reaches the river in higher concentrations as a direct result of Healdsburg's discharge of sewage into the pond. Mr. John Lambie, a water trial expert for Healdsburg, testified that the average concentration of chloride appearing *upstream* in the river is only 5.9 parts per million. In contrast, the average concentration of chloride in the water exiting Basalt Pond is 36 parts per million. At a monitoring well between the pond and the river, the underground concentration is diluted to some 30 parts per million. Ultimately, a chloride concentration of 18 parts per million appears on the west side of the river adjacent to the pond. As such, chloride from the pond over time makes its way

to the river in higher concentrations than naturally occurring in the river (Tr. 588-92).[3]

The river and the pond rise and fall in tandem. The reason is that they are connected by the aquifer. A relative change in the heads of pressure between the two waterbodies will influence each, almost immediately, causing an adjustment in the surface levels. This influence is "hydraulic," meaning the pressure is transmitted within the underground fluid body itself. One might think that river water was flowing into the pond via the aquifer, but not so. The levels do not rise and fall in tandem for any such

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[3] This finding is further supported by Dr. Larry Russell, one of River Watch's trial experts. Chloride is a highly soluble pollutant that moves with the flow of water. Were it not for the discharge into the river, Dr. Russell stated that the chloride in the pond would build up, thereby making it saltier and saltier from year to year. That, however, is not the case here. The chloride levels in the pond generally remain steady, which means that what Healdsburg discharges into the pond in the form of chloride must go through the groundwater aquifer and eventually out into the river, even if it is in a more diluted form (Tr. 94-95). Although Dr. Russell did not express an opinion as to what quantity of chloride could emerge in the river from the pond, he did examine data taken from the monitoring well fifty feet away from the pond. The data was gathered and presented in an environmental impact report prepared by Healdsburg. The measurements were commensurate with the figures considered by Dr. Lambie in that the chloride levels at the pond and at the well were of the same order of magnitude. Dr. Russell concluded that there was a migration of chloride from the pond through the well and then to the river (Tr. 96-97).

reason. Such a direct effect would be difficult, given the slow transit time of water through the sponge-like, gravelly texture of the alluvium. Instead, the reason is, as stated, because the gravel is saturated with water and it instantly transmits any pressure change. Any pressure difference in the river, as it rises and falls, is thus transmitted through the aquifer, which forces groundwater up into the pond or pulls pond water through bottom and side layers down into the alluvium, as the case may be. The above represent the findings necessary to address the main conclusions of law. For clarity and ease in presentation, additional findings will be made below.

CONCLUSIONS OF LAW

The Clean Water Act of 1972 established two programs of importance to this case. *Section 402* authorized the Environmental Protection Agency to administer the National Pollution Discharge Elimination System (NPDES). Under *Section 301(a)*, sewage treatment facilities and other point sources were barred from making discharges into the navigable waters of the United States without an NPDES permit. *33 U.S.C. 1311(a)*. The Act allowed EPA to authorize state agencies to administer the NPDES program. In most states, including California, the NPDES program is administered by state agencies pursuant to federal standards. The second program of note herein was authorized by *Section 404*. It prohibited dredging or filling of any navigable waters of the United States without a permit from the Army Corps of Engineers. *33 U.S.C. 1344*. Thus, the jurisdictional reach of both programs depends on the term "navigable waters of the United States."

All agree herein that the Russian River falls within the "navigable waters of the United States." The Healdsburg system is a "point source." All agree that Healdsburg has never had an NPDES permit. The issue is whether Basalt Pond and/or its wetlands fall within the navigable waters of the United States such that an NPDES permit is required.

If Healdsburg were required to apply for and obtain an NPDES permit, it would be subject to regulation over and above that imposed by its state-issued permits. For example, Healdsburg currently chlorinates its treated sewage but is not required to de-chlorinate it prior to discharge into Basalt Pond. This would change if the pond were within the "navigable waters of the United States." Healdsburg would then need an NPDES permit and be required to de-chlorinate its treated sewage prior to discharge (Tr. 295-96). Thereafter, to ensure compliance with the Act, Healdsburg would have to establish and maintain records and install, use, and maintain equipment to monitor and sample the chlorine (or any other pollutant) present in its discharge. On a regular basis, compliance reports would have to be submitted to the California Regional Water Quality Control Board for review.

1. THE NAVIGABLE WATERS OF THE UNITED STATES.

The "navigable waters of the United States" is a term of venerable vintage, first appearing as "navigable waters" in the celebrated case of *Gibbons v. Ogden, 22 U.S. 1, 21-22, 6 L. Ed. 23 (1824)*, and then in full form in *Mayor of New York v. Miln, 36 U.S. 102,*

135, 9 L. Ed. 648 (1837). It defines a federal servitude, derived from the *commerce clause*, that overlays what might otherwise be considered state waters. After decades of federal common-law usage, Congress adopted the term to set the jurisdictional limits of numerous river, harbor, and waterway laws.

The Clean Water Act of 1972 defined the term "navigable waters" to mean "waters of the United States, including the territorial seas." *33 U.S.C. 1362(7).* This definition is an important one, for it defines the outer jurisdictional limits of two federal agencies under the Act -- the Environmental Protection Agency and the Army Corps of Engineers. The manifest intent was expansive -- to cover not just waters deemed navigable under the traditional test but to cover any waters affecting interstate commerce. *Leslie Salt Co. v. United States, 896 F.2d 354, 357 (9th Cir. 1990).* Even under the narrowest definition, it is generally agreed that the term covers (i) actually navigable waters, (ii) their tributaries, and (iii) wetlands adjacent to each. This case presents issues under both the "tributary" prong and the "wetlands" prong. The latter will be considered first.

2. WETLANDS.

After the Act was passed, an issue arose concerning the extent to which adjacent wetlands were covered. Subdividers, developers and others wished to fill in wetlands and build. In 1978, the Army Corps of Engineers, however, issued an interpretative ruling stating that "adjacent wetlands" were within the protection of "waters of the United States." This brought such wetlands under *Section 404 of the Act*

which prohibits dredging or filling without a permit from the Corps. *33 U.S.C. 1344*. Although the wetlands regulation has been reissued from time to time, and twice reviewed by the Supreme Court, the language here relevant has been in the regulation all along.

Under the interpretive regulation, the term "waters of the United States" includes "wetlands adjacent to" a navigable water like the Russian River. *33 C.F.R. 328.3(a)(7) (2003)*.

In turn, the term "wetlands" is defined as follows:

> The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Id. at *328.3(b)*.

"Adjacent," in turn, is defined as follows:

> The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach

> dunes and the like are "adjacent wetlands."

Id. at *328.3(c).*

The interpretive rule of the Army Corps of Engineers was litigated all the way to the United States Supreme Court by a Michigan owner of a housing developer, Riverside Bayview Homes, Inc. Ruling for the developer, the Sixth Circuit had limited jurisdiction over wetlands to those created by frequent flooding of the nearby navigable waters and excluded wetlands saturated by groundwater or surface water. The Supreme Court reversed and sustained the broader reach of the Act over wetlands as defined in the regulation. The Supreme Court recognized that some point must be found where water ends and land begins. *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985).* In this transitional zone, a regulatory definition was warranted. When the purposes of the Act were considered, the Supreme Court found a more expansive regulation of wetlands under the Act was reasonable and deferred to the Corps' interpretation (*id. at 132-33*):

> Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within

> the meaning of *§ 404(a)*. *Section 404* originated as part of the *Federal Water Pollution Control Act Amendments of 1972*, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, *33 U.S.C. § 1251*. This objective incorporated a broad, systemic view of the goals of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." H.R. Rep. No 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

The Supreme Court repudiated the notion that wetlands themselves had to be navigable (*id.* at 133):

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA § § 301(a), 404(a), 502(12), *33 U.S.C. § § 1311(a), 1344(a), 1362(12)*, the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had

> been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the *Commerce Clause* to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

The Supreme Court found reasonable the agency's conclusion "that adjacent wetlands are inseparably bound up with the 'waters' of the United States." *Id.* at 134. In part, the Supreme Court stated (*ibid.*):

> . . . The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see *33 CFR § 320.4(b)(2)(vii) (1985)*, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see *§ § 320.4(b)(2)(iv)and (v)*. In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *§ 320.4(b)(2)(i)*. In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may

> function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.

This ringing language is now invoked by River Watch. Without question, *Riverside Bayview* militates in favor of an expansive view of Clean Water Act jurisdiction over wetlands. Healdsburg contends, however, that a later decision by the Supreme Court limited *Riverside Bayview*. More specifically, Healdsburg maintains the Supreme Court has now imposed a "hydrological-connection" requirement or, to state what Healdsburg really means, a "*surface* hydrological-connection" requirement.

It is true that *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001)* ("*SWANCC*"), held that the Corps had gone too far in asserting jurisdiction over a series of nonnavigable, intrastate, isolated, and abandoned mining pits away from any navigable waters and whose only connection to navigable water was that migratory birds used both as habitat. In rejecting the Corps' so-called "migratory-bird rule," a wetlands rule added by the Corps in 1986 to reach isolated intrastate waters, the Supreme Court said: "The term 'navigable' has at least the import of showing what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC, 531 U.S. at 172.*

Although the Ninth Circuit has not yet ruled on the restrictive theory advanced by Healdsburg, the Ninth Circuit seems to have read *SWANCC* as only invalidating the migratory-bird rule as applied to isolated waters. *Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001).* At all events, as this Court reads it, *SWANCC* did not impose a rule of "hydrological connection," much less a rule of "*surface* hydrological connection."

SWANCC dealt specifically with physically *isolated* rather than *adjacent* waterbodies. The Supreme Court recognized this when it stated:

> We found [in *Riverside Bayview*] that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States."
>
> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes.* Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." In order to rule for [the Corps] here, we would have to hold that jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

SWANCC at 167-68 (citations omitted and emphasis in original). Rather than impose a hydrological-connection requirement, *SWANCC* reaffirmed that wetlands (and other waterbodies like ponds) *adjacent to navigable waters* share a significant nexus worthy of protection under the Clean Water Act. *See id. at 171* (acknowledging that "it is . . . plausible . . . that Congress simply wanted to include all waters adjacent to 'navigable waters' such as nonnavigable tributaries and streams"). *SWANCC* does not impose a hydrological-connection requirement for adjacent wetlands and waters.

Therefore, even in its narrowest reading, *SWANCC* appears to recognize jurisdiction over (i) actually navigable waters, (ii) their tributaries, and/or (iii) wetlands adjacent to each.

Once adjacency is established, the tributary issue is superfluous. Once wetlands are found to be adjacent to a river actually navigable, there is no need to investigate whether the wetlands are interconnected by surface or groundwaters. The regulation, approved in *Riverside Bayview*, recognizes this in stating that wetlands separated by berms or levees are covered. Plainly, a berm or levee is inconsistent with any surface connection. No caselaw is cited holding that adjacent wetlands must also have a surface hydrological connection.

Although the Corps does not administer the NPDES program -- EPA does so in conjunction with state agencies -- EPA has adopted a parallel definition for wetlands. *40 C.F.R. 122.2 (2003)*. Since the Act authorizes both the NPDES regulation and the dredge-

and-fill regulation, their jurisdictional scope should be the same. Therefore, it is proper to use the Corps' definition in this NPDES case.

Applying the regulation to the facts of this case, this order now holds that Basalt Pond and its wetlands are "adjacent" to the Russian River within the meaning of the regulation. The Basalt Pond wetlands are within a few hundred feet of the Russian River and at points as little as fifty feet, the difference depending only on the water level of the river and the exact point used along the half-mile long length of the pond. A man-made levee separates the two. The regulation specifically states that "wetlands separated from other waters of the United States by man-made dikes or barriers . . . and the like are 'adjacent wetlands.'" *33 C.F.R. 328(c)*. Again, a surface-water requirement would be inconsistent with this definition, for dikes and barriers and levees are manifestly intended to prevent a surface-water connection. Although the Supreme Court held in *Riverside Bayview* that there is no requirement that the wetlands be inundated periodically by the river, the wetlands at issue would, in fact, be flooded in the rainy season but for the levee.

While such a connection is unnecessary for jurisdiction purposes, there is, in fact, an intimate and persistent hydrological connection, albeit underground. The pond drains into the aquifer and at least 26 percent of the pond's volume concededly surfaces in the river itself (and this order finds that substantially more drains actually into the river). There is also an immediate underground hydraulic connection between the two bodies, such that the water level in each immediately affects the water level in the other. Even

on the *surface,* there is an episodic connection; when the levee breaches, as it has three times in the last eight years, the two waterbodies substantially commingle.

Finally, as in *Riverside Bayview,* the pond, the river, and the wetlands all share the same ecosystem. The wetlands in question help filter pollutants entering the aquifer and hence the river proper.[4] In every way the pond and wetlands are "adjacent to" the Russian River. Healdsburg's own trial expert on wetlands, a private consultant for hire on the Corps' regulations, even admitted that the pond could be considered a type of wetland defined by *Section 404 of the Clean Water Act* (Tr. 402-03). In short, the pond and the wetlands are "waters of the United States" within the meaning of the Act.[5]

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[4] To avoid the observation in *Riverside Bayview* that wetlands serve to filter and to purify waters, Healdsburg argues that no water filters through the *sides* of Basalt Pond and that all the water exits *only* through the *bottom* of the pond. This curious suspension of the laws of physics fails on the facts, as found above. Given that Healdsburg also argues the bottom of the pond is up to a million times less permeable than the surrounding aquifer -- practically hermetically sealed -- there is all the more reason that fluid must drain, at least in part, through the sides and through the wetlands to avoid overflowing (as millions of gallons yearly pour in from the plant).

[5] Contrary to Healdsburg's argument, it does not matter that the wetlands were man-made. *Leslie Salt Co., supra, 896 F.2d at 358.*

3. OPEN WATERS VS. WETLANDS.

The accused discharges, Healdsburg contends, are to "open water," not to the sides of the pond where the wetlands reside. This argument draws a sharp distinction between the middle and sides of the water body. Healdsburg contends it may discharge with impunity into the middle. The argument, however, fails on the facts. The outfall is at the northwest corner of the pond, not in the center. The pond is now surrounded by wetlands. Healdsburg's own wetlands expert testified that virtually the entire perimeter qualifies as "wetlands" (Tr. 406). The discharges at the northwest corner near the wetlands must be deemed into the wetlands.

Even if the outfall were in the dead center of Basalt Pond, the pond is sufficiently small that the entire pond must be deemed to be inseparably bound up in the wetlands now surrounding it. The saturated margins of the pond -- concededly wetlands -- are, of course, part of the pond itself. The margins meld into water in one direction and into land in the other. Sediments from the shoals spread across the pond and sink to the underwater sides and bottom. Wetlands are typically characterized by wet earth interspersed with open pools, inlets, outlets and other water. At some size, a pond surrounded by wetlands becomes so small with such a cross-identity of ecology and with such a cross-identity of water quality, that the pond must be

deemed inseparable from the wetlands rather than a separate sheet of open water. So here.[6]

An alternative way to view the problem, reaching the same result, is that the pond itself is a "point source" directly abutting and discharging into the wetlands. There is substantial merit to this conclusion since Healdsburg itself argues vigorously that the pond is an integral part of its treatment facility, supplying a final step it calls "percolation" or "polishing." If so, the entire pond must be deemed a "point source" -- otherwise, Healdsburg would have no point source at all. The term "point source" has been taken beyond pipes and ditches and now includes less discrete conveyances, such as cesspools and ponds. An analogous holding was made concerning a 38-acre man-made tailing pond in *Washington Wilderness Coalition v. Hecla Min. Co., 870 F. Supp. 983, 988 (E.D. Wash. 1994)*; *see also Community Ass'n for Restoration v. Bosma Dairy, 305 F.3d 943, 955 (9th Cir. 2002)*. So viewed, the point source is right in the middle of and directly abuts the protected wetlands.

This leads to Healdsburg's invocation of an express exception under the regulation. The definition of "waters of the United States" excludes:

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[6] On summary judgment, this Court previously held that, regardless of the wetlands here involved, ponds adjacent to navigable rivers and sharing the same ecosystem and having underground connection to the river are subject to Clean Water Act jurisdiction. The Basalt Pond would so qualify even without the wetlands (absent an exception). This is an alternative ground for rejecting the "open-water" argument advanced by Healdsburg.

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in *40 CFR 423.11(m)* which also meet the criteria of this definition) are not waters of the United States.

33 C.F.R. 328.3(a) (last paragraph).

This exception does not aid Healdsburg. Although the Healdsburg waste-treatment system was designed so as to use a former mining pit like the Basalt Pond as a percolation pond, and it was intended that natural filtration would occur as fluid percolated through the lining of the pond, this order holds that Basalt Pond itself was not "designed" to meet the requirements of the Clean Water Act or "designed" to be part of the waste-treatment system. The pond preexisted the plant. It preexisted the Clean Water Act. The pond was not "designed" with sewage disposal in mind. The pond was simply the result of digging a pit in the earth that filled with groundwater. No doubt, the actual plant was "designed" to take advantage of abandoned mining pits like Basalt Pond, but the pits themselves were not so "designed."

4. TRIBUTARY.

Although it is unnecessary to reach it, this order also holds that Basalt Pond and the subterranean groundwater that flows through it are "tributaries" of the Russian River. This order recognizes that the caselaw is divided over whether the "tributary" prong can be satisfied by *groundwater* as opposed to surface

waters. The Ninth Circuit has not yet addressed the question. This Court finds persuasive the line of authority represented by *Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178-80 (D. Idaho 2001)*, holding that the Act extends federal jurisdiction over groundwaters hydrologically connected to surface waters that are themselves navigable waters.

It is urged that no discernible impact on the river has been shown and therefore a *sine qua non* of jurisdiction is missing under *Bosna* and similar cases. Contrary to Healdsburg, however, the record shows that excessive amounts of chloride from Healdsburg's effluent in fact pollute the river. The record shows actual measurements from the monitoring wells between the pond and the river showing pollution. One may reasonably infer, as this order does, that this pollution reaches the nearby river. It, of course, is then greatly diluted by the river. Nonetheless, the total volume of pollutants reaching the river over a year is substantial. This is an alternative ground for concluding that Basalt Pond and the wetlands are within the navigable waters of the United States. [7]

5. ABANDONMENT OF EXCAVATION OPERATIONS.

The final argument made by Healdsburg is not based on any statute or regulation or caselaw but on

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[7] For this, among other reasons, plaintiff has standing to bring this suit, for a remedial order will benefit the river. It is stipulated that plaintiff has standing to bring this action to vindicate aesthetic and recreational interests concerning the river.

an agency statement in a preamble to the 1986 revision of the wetlands regulation. In the preamble, the Corps stated that it usually does not consider "pits excavated in dry land for the purpose of obtaining fill, sand, or gravel" to be "waters of the United States . . . until . . . [the] excavation operation is abandoned. . . ." Here is the background.

Pursuant to a directive of the Presidential Task Force on Regulatory Relief, the Corps proposed revisions to its Clean Water Act regulation. After public input, the definitions relevant here were not changed and were simply recodified at *33 C.F.R. 328.3 (1987)*. In its preamble to the Federal Register announcement, however, the Corps added a clarification:

> For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."
>
> (a) Non-tidal drainage and irrigation ditches excavated on dry land.
>
> (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
>
> *(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).*

51 Fed. Reg. 41206, 41217 (1986) (emphasis added).

The comment has never been reduced to a formal regulation. Nonetheless, this order will treat the preamble statement as entitled to deference concerning the agency's own interpretation of its own wetlands regulations and will give it full effect.

Healdsburg urges that the paragraph concerning excavated mining pits, italicized above, saves it from NPDES regulation. Healdsburg argues that Syar has not "abandoned" its "excavation operation" at Basalt

Pond because, although excavation itself ceased long ago, the reclamation slurry is still underway. As long as Syar is continuing to reclaim the pond, no matter how slowly, then jurisdiction is absent, Healdsburg urges.

This order rejects the argument. Healdsburg itself, in a recent environmental impact report, called Basalt Pond "an abandoned quarry" (TX 24 at H3038). No rock or sand has been excavated from Basalt Pond since 1984. It is stipulated herein that "excavation at Basalt Pond ceased in approximately 1984" and that Syar conducts "pit-excavation activities" on "nearby lands," there being no similar stipulation as to Basalt Pond. In fact, Syar itself has never extracted rock or sand from the pond, having acquired it after all such extraction was over. Instead, its only operation has been *to insert, not to extract,* silt. The silt, moreover, is not even from Basalt Pond but from elsewhere. The silt is the by-product of processing sand and gravel (again, from elsewhere) and is pumped via a long pipe to Basalt Pond, where it is slowly being fed into the margins of the pond, the feed point being moved from time to time. This is being done pursuant to a local order to reclaim the pond.

Healdsburg would stretch "excavation operation," as used in the preamble, to comprehend not only excavation but steps taken thereafter to fill the pit. The word "excavation" cannot bear this reading. As the preamble sentence in question states, excavation is "for the purpose of *obtaining* fill, sand, or gravel." It is not for the purpose of filling in or remediating the pit after excavation has ceased. Filling in and extraction are opposites. Once filling in begins, extraction is

foreclosed and must be deemed abandoned. *Golden Gate Audubon Soc., Inc. v. United States Army Corps of Engineers, 796 F. Supp. 1306, 1315 (N.D. Cal. 1992)* (Henderson, J.). There is also a big difference in terms of water quality between *extracting* natural materials from a pit versus *filling up* a pit with foreign matter that could be anything from dirt to wastes to toxics. Any doubt should be resolved against any exclusion, in order to promote the purpose of the Act. *United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986).*

Even the preamble refused to say that all pits would be ignored. Instead, the preamble merely stated how the Corps "generally" considered them and acknowledged that pits would be subject to jurisdiction on a case-by-case basis under *Section 404. EPA* likewise so reserved case-by-case jurisdiction under *Section 402*. Necessarily, this means that at least some water-filled pits are waters of the United States. In deciding which are which, we must harken back to *Riverside Bayview* and the fundamental objectives of the Act. We should, therefore, consider the proximity to the river, the beneficial role of the wetlands, the intertwined ecology and riparian habitat. Rather than focus only on Syar's desultory slurry, the focus should also be on the gushing flow of treated sewage into the pond. Once thriving wetlands have curled about such a site, it would be topsy turvy to reject protective jurisdiction solely because reclamation efforts are underway. Indeed, a contrary ruling would allow dumping of *anything* by *anyone* Syar licensed insofar as federal law is concerned.

While the foregoing is dispositive of Healdsburg's argument, this order must reject plaintiff's alternative

ground in opposition. The argument is that the pit was abandoned from 1984 to 1986 and was by then already within the navigable waters of the United States. Between 1984 and 1986, there was no commercial activity of any kind at the pond, even remediation (TX 7 at RW0462-63). The pit was idle without any question in that two-year period. The pond then would have been subject to jurisdiction so long as the pond otherwise qualified as a water of the United States. Plaintiff so urges. The difficulty with plaintiff's alternative argument is that the wetlands around the pond developed *after* 1986. The thriving aquatic life portrayed at trial as part of the integrated ecosystem all came *later*. The record does not show that the pit, even though abandoned in 1984-86, qualified *then* as a wetland or as water of the United States. Plaintiff's alternative argument therefore must be rejected.

6. THE DISTRICT OFFICE LETTER.

This leads, finally, to the refusal by the district office of the Corps of Engineers to assert jurisdiction over Basalt Pond, a separate point of deference urged by Healdsburg. This has proven to be one of the more remarkable aspects of the case. In brief, at a time when Syar was still a party herein, plaintiff's counsel asked the Corps' district office to assert jurisdiction over Basalt Pond. It declined to do so. Healdsburg now argues that deference is due to the judgment of the district office to decline jurisdiction, the NPDES jurisdiction being coextensive with the Corps' jurisdiction.

Although deference is due to a reasonable agency interpretation of a statute administered by the agency

and to nationally-promulgated interpretations of its own regulations, a different problem is presented in deciding how much deference is due to a single refusal to act by a single district office of an agency. Before turning to the law that governs, it is most illuminating to review what actually happened here. The following seven paragraphs constitute the Court's further findings, placed here for convenience and clarity in presentation, on the issue of the Corps' letter.

After this litigation began and before Syar settled out, plaintiff's counsel wrote a letter to the district office of the Corps of Engineers in San Francisco. Counsel supplied information. He requested that the Corps determine that the Basalt Pond wetlands were "waters of the United States."

The response was prepared by Peter Straub, a Corps employee. After receiving the letter, Mr. Straub solicited input from personnel at Syar, whom he admitted at trial were his personal friends. He knew that Syar was then still a defendant. Syar's letter warned Mr. Straub that the request from plaintiff's counsel should be viewed "with skepticism" and that counsel was "attempting to embroil the Corps in these lawsuits." Syar's input showed that reclamation activity was still underway via the slurry described above.

Mr. Straub circulated an internal e-mail within the district office. In the e-mail, he explicitly referred to plaintiff's counsel and Clean Water Act suits in a derogatory and unprofessional way, stating that plaintiff's counsel "reaps money from the public trough by engaging in citizen lawsuits involving the CWA,

ESA, etc." After referring, correctly at first, to plaintiff counsel as Silver & Silver, Mr. Straub changed it to "Slither & Slither" in later references in the same e-mail. He further noted the pendency of the present case and ventured that plaintiff's counsel had requested the Corps' action to bolster plaintiff's case, stating that the suit would "have greater merit if the Corps were to exert jurisdiction . . ." (TX 7 at RW0460).

The e-mail was four paragraphs long, all on one page. The lengthiest paragraph was devoted to demeaning plaintiff's counsel, their motives and the lawsuit. The e-mail concluded that "the Basalt Pond has not been abandoned" and requested the "thoughts" of the four agency recipients of his e-mail. The record shows no responsive analysis by anyone. The record shows no other analytical memos or e-mails by Mr. Straub. The record shows no reprimand or censure of Mr. Straub.

Healdsburg presented Mr. Straub as a trial witness. Significantly, he conceded that in thinking through the issue, he did not focus on whether the reclamation slurry was an "excavation operation" within the meaning of the preamble (Tr. 445-46; 456; 465). Indeed, his final letter to counsel even recognized that "mining operations" had long since ceased (TX 7 at RW0480). Rather, his focus was solely on whether any associated activity whatsoever was still being conducted at Basalt Pond by the owner. In other words, his view was that as long as the owner had any activity underway relating to the pond, however slight, then there was no "abandonment" within the meaning of the preamble and thus no jurisdiction.

There is no evidence that Mr. Straub or anyone else consulted a national, regional or even local guideline or any set of internal precedents or any expert on the subject within the Corps. Although the Chief of Engineers periodically issues Regulatory Guidance Letters with formal policy guidance to local offices, no such RGL was obtained here or consulted insofar as the record shows. There is no evidence that Mr. Straub or anyone else in the chain of review in the district office had experience or training on the issue raised. No one inspected the property in response to the inquiry. No one examined the wetlands or the effluent discharges.[8] No one took into account that the pond was an "abandoned quarry," as Healdsburg itself had stated. Mr. Straub simply drafted a short letter declining jurisdiction and sent it up the chain of local command, which signed off without comment shown on this record, and the letter went out.

Mr. Straub was biased against this lawsuit and the lawyers behind it. Mr. Straub knew, even stated, that an exercise of jurisdiction would aid plaintiff and counsel who "reap money from the public trough by engaging in citizen lawsuits." He knew that to do so would hurt his admitted friends at Syar, then a

---

[8] The Corps has no jurisdiction respecting NPDES permits. It does have jurisdiction over filling wetlands (and other waters of the United States) and permits therefor. Plaintiff tries to use this distinction to dismiss the letter as irrelevant. Not so. Plaintiff otherwise itself relies upon the Corps' own wetland regulation. Having invoked the Corps' wetland regulation, plaintiff cannot run away from any and all attempts by the Corps to interpret its regulation. Rather, the question is how persuasive the attempt is.

defendant in the case. Although Mr. Straub denied at trial that he *was* biased or that his unkind remarks affected his analysis, his e-mail spoke louder and with more candor. Plainly, he *was* biased against plaintiff and this suit. This order so finds. The Court disbelieves Mr. Straub's attempt to brush off his bias. Moreover, no special expertise was brought to bear, it being completely unclear whether Mr. Straub had any experience or training on the subject. No reasonable investigation was conducted. No attempt to perform a case-by-case analysis was made as stated by the preamble. No account was taken of the wetlands, the proximity to the river, the ecology, or the large tonnage of treated sewage flowing into the pond and wetlands. Although Mr. Straub and one of his colleagues testified at trial, neither attempted to re-affirm the conclusions reached in the letter. Their testimony was instead limited to the historical facts leading up to the letter itself.

* * *

How much deference is due to the district office's refusal to act? Healdsburg's counsel would invoke the letter with all the full-dress deference required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. Of course, the Supreme Court there held that a court must give effect to an agency's regulations containing a reasonable interpretation of an ambiguous statute. But as counsel must surely know, the Supreme Court has limited *Chevron* and refused to apply it to a localized letter like the one at issue here. In *Christensen v. Harris County, 529 U.S. 576, 587, 146 L. Ed. 2d 621, 120 S. Ct. 1655 (2000)*, for

example, the Supreme Court refused to give any deference to an agency interpretation contained in an agency opinion letter without any formal adjudication or notice-and-comment rulemaking:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference. See, *e.g., Reno v. Koray, 515 U.S. 50, 61, 132 L. Ed. 2d 46, 115 S. Ct. 2021 (1995)* (internal agency guideline, which is not "subject to the rigors of the *Administrative Procedure Act*, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co., 499 U.S. 244, 256-258, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991)* (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 157, 113 L. Ed. 2d 117, 111 S. Ct. 1171 (1991)* (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated

> lawmaking powers"). See generally 1 K. Davis & R. Pierce, Administrative Law Treatise § 3.5 (3d ed. 1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co., 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944)*, but only to the extent that those interpretations have the "power to persuade," *ibid.* See *Arabian American Oil Co., supra, at 256-258.*

Similarly, in *United States v. Mead Corp., 533 U.S. 218, 235, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001)*, the Supreme Court refused to give *Chevron* deference to a ruling letter of the Customs Service regarding a tariff classification. The Supreme Court held it was only entitled to "seek a respect proportional to its power to persuade." The Court noted that "there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 [customs] offices placed around the country at the Nation's entryways." *Id. at 238 n. 19.* So too here. The Corps has 36 district offices, nine division offices, and countless employees in positions like Mr. Straub.

In evaluating the "power to persuade," *Mead* stated (*id. at 228*):

> . . . The fair measure of deference to an agency administering its own statute has been understood to vary with

> circumstances, and courts have looked to the degree of the agency's care [footnote omitted], its consistency [footnote omitted], and relative expertness [footnote omitted], and to the persuasiveness of the agency's position, see *Skidmore, supra, at 139-140*. The approach has produced a spectrum of judicial responses, from great respect at one end, see, *e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389-390, 81 L. Ed. 2d 301, 104 S. Ct. 2472 (1984)* ("'substantial deference'" to administrative construction), to near indifference at the other, see, *e.g., Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-213, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988)* (interpretation advanced for the first time in a litigation brief).

Mead then summed up with a quote from *Skidmore v. Swift & Co., 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944)*:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Applying these factors here, the Corps' letter was not "thorough," nor was the "investigation" preceding it. Nor was the letter or investigation "reasonable," given the manifest prejudice of the staffer principally charged with generating the opinion and the thinness of the inquiry. No attempt was made to perform a case-by-case analysis as reserved by the preamble. As for consistency, no evidence show that the letter was consistent with other rulings. There is no evidence that anyone with special expertise on the issue ever touched the file. To this Court, the ruling seems completely inconsistent with the preamble itself as to the meaning of "excavation operations." The Court has carefully considered the letter and its reasoning as well as the remedial purposes of the Clean Water Act, finding the letter unpersuasive on the merits for all of the reasons stated above.

* * *

The foregoing sets forth the principal findings of fact and conclusions of law. The parties, however, submitted findings and conclusions after trial. This order will now approve certain of those submissions. To the extent not inconsistent with the foregoing, this order approves plaintiff's proposed findings of fact numbered 3, 7-8, 11, 13, 14-15, 17-23, 25-27, 30-39, 44-45, 47-48, 50, 53-56, 58-59, 61-74, 76-79, 81-82, and 85, and plaintiff's proposed conclusions of law numbered 2-7, 11-19, 27, 32, 33, and 38. This order also approves defendant's proposed findings of fact numbered 1-2, 4, 6-7, 10, 12-15, 18, 20-21, 30, 33, 38(A)-(D), (G)-(M), (O)-(V), (X) (but not the lead-in to No. 38), 39(A)-(B), (G)-(I) (but not the lead-in to No. 39), 41(F)-(G) (but not the lead-in to No. 41), 43, 46, 47, 49, 53-61, 63-65, 69-70,

75-77 (except during flooding), 79 (but how uniform the layer is was not established), 85-87, 92, and defendant's proposed conclusions of law numbered 3 and 12. Unapproved proposals were unapproved for a variety of reasons. For instance, some proposals were (i) argumentative or conclusory, (ii) misleading or confusing, overly broad or vague, or (iii) arguably correct but better covered by the Court's own findings. Given that some findings were rejected because they were better covered in the text of this order or were confusing or argumentative, it does not necessarily follow that the Court affirmatively disagreed with all unapproved proposals (and counsel should please not argue otherwise on appeal).

Some proposals, although supported by the testimony, were rejected because the Court found the testimony unpersuasive. For example, defendant's water expert, Mr. Lambie, offered large conclusions based on small evidence, *i.e.*, he tried to take a little bit of empirical evidence too far. His methodology, for example, was to compare *real* groundwater contamination measurements *above* the pond with *hypothetical* groundwater measurements modeled by him *below* the pond (rather than take real-world samples). His conclusion that the bottom layer of the pond is up to one million times denser than the surrounding aquifer is very hard to believe, given that such a figure would make it so impermeable, practically a hermetic seal, that the pond would

overflow or drain only through the sides (rather than percolate through).[9]

RELIEF

Defendant Healdsburg is **ORDERED** to take immediate steps to obtain an NPDES permit and will be **ENJOINED** from making any further discharges into Basalt Pond without an NPDES permit effective **APRIL 22, 2004,** or effective upon such later date Healdsburg can show on noticed motion is the earliest practicable date for obtaining such a permit. A hearing will be held **at 8:00 A.M.** on **FEBRUARY 26, 2004,** to determine the extent of any penalties, each side to submit briefs **TEN CALENDAR DAYS** before. A separate order shall issue concerning attorney's fees.

IT IS SO ORDERED.

Dated: January 23, 2004.

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

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[9] Healdsburg makes the impermeable bottom argument in an attempt to show that the pond is "designed" to be a "closed" system with a "hydrologic separation" from the river and groundwater, an issue this order finds unnecessary to reach. Obviously, however, a membrane permitting percolation is inconsistent with an impermeable membrane.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-04686 WHA

[Filed March 8, 2004]

NORTHERN CALIFORNIA RIVER WATCH, a non-profit corporation,
Plaintiff,

v.

CITY OF HEALDSBURG,
Defendant.

JUDGMENT

Pursuant to the Court's order after bench trial dated January 23, 2004, **JUDGMENT IS HERBY ENTERED** in favor of plaintiff Northern California River Watch and against defendant City of Healdsburg on the issue of liability under the federal Clean Water Act. In a separate order dated March 2, 204, a penalty of $20,000 was imposed. As stated in this latter order, an escalating penalty will apply if defendant does not obtain and comply with an NPDES permit by **MAY 30, 2004.** The Court retains jurisdiction to calculate the

final penalty amount. The matter will be heard **SEPTEMBER 9, 2004, AT 11:00 A.M.**

IT IS SO ORDERED.

Dated: March 8, 2004

/s/
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

U.S. Army Corps of Engineers' Disclaimer of Jurisdiction, dated Feb. 4, 2003

Bates numbers RW0480-RW0482

[See Fold-out Exhibit]

BEST AVAILABLE COPY

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

FEB 04 2003

REPLY TO

Regulatory Branch (1145b)

SUBJECT: File No. 274940N

Mr. Jack Silver
Silver & Silver Law Offices
902 Stevenson Street
Santa Rosa, California 95404

Dear Mr. Silver:

This is in reply to your letter of November 26, 2002, that requests the Corps of Engineers (Corps) to verify the Basalt Pond as a waters of the United States presumably for the purpose of exerting regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344). The Basalt Pond is an approximate 50-acre terrace pit located in proximity to and west of the Russian River and south of the City of Healdsburg's Waste Treatment Plant, in Sonoma County, California.

Unless exempt by regulation, all proposed discharges of dredged or fill material occurring below the plane of ordinary high water in non-tidal waters of the United States and within the lateral extent of wetlands adjacent to these waters require Department of the Army authorization pursuant to Section 404 of the Clean Water Act. Waters of the United States generally include the territorial seas, navigable waters, including all waters subject to the ebb and flow of the tide, non-tidal interstate and intrastate waters, and their tributary waters, including lakes, ponds, rivers, streams, intermittent streams, and adjacent wetlands, the use, degradation, or destruction of which could affect interstate or foreign commerce. Waters of the United States do not typically include pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the excavation operation is abandoned and the resulting waterbody meets the definition of waters of the United States as defined at 33 CFR 328.3(a) (51 FR 41,217; Nov. 13, 1986).

The Basalt Pond was originally excavated in dry land to obtain a source of sand and gravel for construction purposes. Mining operations began in the mid-1950s and effectively ceased in 1984. The current owner, Syar Industries, obtained the Basalt Pond and other properties in 1986. Syar Industries indicates that, while mining operations no longer occur at this terrace pit location, the Basalt Pond remains under "active" commercial use. Syar Industries continues to use the Basalt Pond as a discharge point for slurried fines generated by its aggregate processing plant in the City of Healdsburg. This discharge is made pursuant to Waste Discharge Requirements 87-123, issued by the California Regional Water Quality Control Board, and various reclamation requirements of the California Surface Mining and Reclamation Act (P.R.C. 2710 et seq.) and Sonoma County Resolution No. 93-0700. In addition, Syar Industries

discharges overburden excavated from its Phase V Pond into the Basalt Pond to strengthen the intervening levee. This discharge is made pursuant to various reclamation requirements of Sonoma County Resolution No. 99-1237. Due to these continuing reclamation activities required by the State of California and the County of Sonoma, the Corps concludes that the Basalt Pond is not currently abandoned and therefore elects not to exert regulatory jurisdiction pursuant to Section 404 of the Clean Water Act.

This determination on the current jurisdictional status of the Basalt Pond will remain valid for a period of five (5) years from the date of this letter, unless new information or a change in circumstance warrants a reevaluation of the activity or the site prior to the expiration date. The current absence of jurisdictional waters does not obviate any requirement to obtain other Federal, State, or local approvals required by law, including compliance with the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

You may refer any questions on this matter to Mr. Peter Straub of my staff at telephone 415-977-8443. All correspondence should be addressed to the Regulatory Branch, North Section, referencing the file number at the head of this letter.

Sincerely,

ORIGINAL SIGNED
By
Calvin C. Fong

Calvin C. Fong
Chief, Regulatory Branch

Copies Furnished:

US EPA, San Francisco, CA
CA RWQCB, Santa Rosa, CA
City of Healdsburg, Healdsburg, CA
Syar Industries, Napa, CA

CF:
CESPN-OR-RN (Straub)
CESPN-OR-R Rdg File

STRAUB
CESPN-OR-RN
415-977-8443
23 January 2003

HICKS 1/28/03
CESPN-OR-RN

EFT
CESPN-OC

FONG
CESPN-OR-R 1/24